FILED

94-22

No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

Diane Washington,

Petitioner

v.

United States of America,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Feres* doctrine prevent a reservist who was injured while she was not on active duty and while she was not training from bringing an action against the United States under the Federal Tort Claims Act where she was injured by an off duty HIV positive full time serviceman who the Navy negligently failed to order to disclose his HIV positive status to her as required by regulations ?

2. Does the *Feres* doctrine prevent a reservist who was injured while she was not on active duty and while she was not training from bringing an action against the United States under the Federal Tort Claims Act where she was injured because of the negligence of military

health care providers who treated the HIV positive full time serviceman who injured her ?

3. Does the *Feres* doctrine prevent a reservist who was injured while she was not on active duty while she was not training from bringing an action against the United States under the Federal Tort Claims Act based on the negligence of a good samaritan employed by the government who possibly increased the risk of harm to her from the HIV positive serviceman who injured her ?

LISTING OF PARTIES

The caption contains all of the parties to the proceedings before the United States Court of Appeals for the Ninth Circuit and the District Court for the Southern District of California.

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Diane Washington respectfully petitions this Court for a writ of certiorari to review the decree of the court of appeals for the Ninth Circuit which affirmed the judgment of the district court dismissing her case.

I.

OPINIONS BELOW

The memorandum opinion of the court of appeals for the ninth circut is not reported and is contained in the Appendix. App., infra, A-1 - A-18. The decision of the court of appeals which denied Diane Washington's petition for rehearing is not reported and is contained in the Appendix. App., infra, A-41 - A-42. The opinion of the district court granting the motion to dismiss is not reported and is contained in the

Appendix (App., infra, A-19 - A-20) as is the transcript of the oral argument of the motion hearing (App., infra, A-21 - A-39). The judgment entered by the district court pursuant to its opinion is included in the Appendix. (App., infra, A-40). An earlier written order of the district court in the same case which granted in part, and denied in part, a motion to dismiss brought by the defendants is also contained in the Appendix. App., infra, A-43 - A-45.

II.

JURISDICTION

The court of appeals rendered its decree on November 16, 1993 and denied the petition for rehearing on February 7, 1994. The mandate was filed in the district court on March 7, 1994. The jurisdiction of

this Court is invoked under 28 U.S.C. §1254 (1).

III.

STATUTE AND REGULATIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. §1346 (b), provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have the exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal

injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Navy regulation SECNAV INSTRUCTION 5300.30A 27 October 1987, which was in effect when John Joseph was first diagnosed HIV positive, provided in pertinent part:

13. Medical and Epidemiological Factors.

(a) ...

(b) ...

(1) ...

(a) HIV positive individuals who are military health care beneficiaries shall be counseled by a physician or designated health care provider regarding the significance of a positive antibody test. They shall be advised as to the mode of transmission of this virus, the appropriate precautions and personal hygiene measures required to minimize transmission through sexual activities and/or initimate contact with blood or blood products, and of the need to advise any past sexual partners of their infection and directed to follow these preventative medicine

procedures. Women shall be advised of the risk of perinatal transmission during past, current, and future pregancies. The beneficiary shall be informed that he or she is ineligible to donate blood.

Navy regulation SECNAV INSTRUCTION 5300.30B 15 December 1988, (App., infra, A-46 - A-96), which was in effect when Diane Washington was injured, provided in pertinent part:

> 12. Medical and Epidemiological Factors.
>
> (a)...
>
> (b)...
>
> (1) ...
>
> (a) HIV positive individuals who are military health care beneficiaries shall be counseled by a physician or

designated health care provider regarding the significance of a positive antibody test. They shall be advised as to the mode of transmission of this virus, the appropriate precautions and personal hygiene measures required to minimize transmission through sexual activities and/or initimate contact with blood or blood products, and of the need to advise any past sexual partners of their infection and directed to follow these preventative medicine procedures. Women shall be advised of the risk of perinatal transmission during past, current, and future pregancies.

The beneficiary shall be informed that he or she is ineligible to donate blood, organs, sperm, or any other body part.

The order issued to Diane Washington pursuant SECNAV INSTRUCTION 5300.30B is included in the Appendix. App., infra, A-97 - A-99.

IV.

STATEMENT OF THE CASE

A. Statement of Relevant Facts.

In April or May 1988 the Navy transferred petty officer John Joseph from Hawaii to Oakland, California after he was found to be HIV positive. John Joseph had a history of venereal disease before being diagnosed HIV positive. The Navy healthcare personnel in Hawaii did not order John Joseph to disclose his HIV positive status to potential sexual partners despite SECNAV INSTRUCTION 5300.30A (quoted

in pertinent part above) which was then in effect.

In Oakland, California John Joseph, who was a beneficiary of military health care benefits, was treated, and tested both physically and mentally for problems relating to his HIV positive condition. In July 1988, John Joseph received counseling in a leaflet entitled "INFORMATION FOR PEOPLE WHO ARE HTLV-III ANTIBODY POSITIVE" which was given to him by his military health care providers. This leaflet suggests HIV positive persons discontinue sexual activity altogether and that they discuss their HIV status with sexual partners of his condition before having

intercourse with them, but made it clear such prior disclosures were optional by stating:

"each person must decide for himself or herself what to do."

At the time this counseling was given it was directly contrary California law concerning the duty to disclose communicable diseases to sexual partners. Kathleen K. v. Robert B., 150 Cal.App.3d 992, 996-997 (1984). While in Oakland, California John Joseph was never ordered to disclose his HIV positive status to potential sexual partners.

John Joseph was released from his treatment back to duty and was ultimately transferred to San Diego, California. He was subject to ongoing medical monitoring. On or about November 24, 1988, John

Joseph's wife telephoned his commanding officer, Commander Schamp, and informed him John Joseph was sleeping with women and not telling them he had AIDS. Commander Schamp purportedly discussed with John Joseph the conduct reported by John Joseph's wife. Commander Schamp apparently did not refer John Joseph to a physician or psychiatrist for further evaluation and treatment. The details of their discussions are not clear because petitioner was unable to complete discovery in the case before the motion to dismiss was granted. It is unknown whether any attempts were made to contact the women with whom John Joseph was allegedly sleeping. John Joseph apparently denied his wife's accusations and

apparently (based on his later conduct with petitioner) left his meeting with Schamp feeling he could to continue to sleep with women without disclosing his HIV positive status. On December 15, 1988 the Secretary of the Navy issued SECNAV INSTRUCTION 5300.30B and published it to all commands. Neither, Commander Schamp, nor any of John Joseph's healthcare providers ordered John Joseph to disclose his HIV positive status to potential sexual partners pursuant to this regulation either.

Diane Washington is a Navy reservist who while on assigned duty worked part-time in the same office as John Joseph. She first met John Joseph in December 1988 and

they began dating. On January 22, 1989 petitioner was not on active duty and was not involved in active or inactive-duty training. On that day, at his off-base apartment in San Diego, California, John Joseph had sexual intercourse with Diane Washington. John Joseph did not tell Diane Washington he was HIV positive before he had intercourse with her and during the course of their activity he infected her with the human immunodeficiency virus. Diane Washington would not have had sexual intercourse with John Joseph if she had known he was HIV positive. When petitioner later tested HIV positive, she was promptly ordered, pursuant to

Navy regulation SECNAV INSTRUCTION 5300.30B, to disclose her HIV positive status to potential sexual partners. App., infra, A-97 - A-99.

John Joseph was court martialed concerning what he did to Diane Washington and in April 1990 was convicted of aggravated assault for infecting her with HIV. U.S. v. Joseph, 33 M.J. 960 (N.M.C.M.R. 1991) aff'd 37 M.J. 392 (U.S.C.M.A 1993). During the course of the court martial proceedings, Diane Washington discovered John Joseph had never been ordered to disclose his HIV positive status. One of John Joseph's defenses at his court martial trial was that he would have acted differently if he had been

ordered to disclose his HIV positive status.

Diane Washington was denied disability and other benefits because her injury is not service connected. Diane Washington is still functioning, but lives daily under the extreme stress of her condition. She must undergo continual medical monitoring and has had to modify her life dramatically because of her condition.

B. Proceedings and Jurisdiction Below.

On May 22, 1990, Diane Washington filed an administrative claim for damages for her injuries with the Department of the Navy. They Navy took no action concerning her claim. After the required six months lapsed, Diane

Washington filed a complaint under the Federal Tort Claims Act, 28 U.S.C. §1346 (b), in the United States District Court for the Southern District of California pursuant to 28 U.S.C. §2675 (a). Diane Washington's first complaint was dismissed without prejudice in July 1991 after a motion to dismiss. She filed a new complaint in pro persona in the same district court on September 10, 1991. The government again brought a motion to dismiss, which was granted as to Lawrence Garret III, but denied as to the United States of America on May 18, 1992. In its order issued after the hearing on that motion, the district court concluded Diane Washington had stated a claim under California law against the United States of

America which it deemed the proper defendant pursuant to 28 U.S.C. §2679. App., infra, A-43 - A-45. In its opinion the district court cites the case of Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976) which case was specifically referenced by petitioner in the changes she made to her complaint.

The United States of America answered the second complaint on June 18, 1992 but then again in September 1992 brought a renewed motion to dismiss, or in the alternative, for summary judgment. In her papers responding to the motion, petitioner, who had now retained counsel, requested both leave to amend as necessary, and time to complete discovery.

The Memorandum Opinion of the court of appeal is unclear about Petitioner's request for leave to amend (which was made) but did not find that determinative of its decision because of its *Feres* doctrine analysis. App., infra, A-11 n.7. Petitioner conceded in her arguments before the court of appeal that her in pro per complaint was not as clear and detailied as it could be, but also argued that some of the facts relating to the proposed amendments had only been revealed during discovery and that leave to amend would be appropriate pursuant to this Court's holding and reasoning in Conley v. Gibson, 355 U.S. 41, 47 (1957).

Even though the allegations in the complaint had not changed since

the district court had found a cause of action had been stated under California law, Judge Gilliam decided to grant the renewed motion to dismiss. He made it clear any further arguments by petitioner would have to be made at the appellate level. App., infra, A-37, A-39 (stating, "I think you should appeal that, counsel", "Those would be arguments for the appellate court."). On October 28, 1992 the clerk entered judgment dismissing the case pursuant to the district court's order. App., infra, A-40.

Appellant filed her notice of appeal from the judgment on October 28, 1992. The court of appeal for the ninth circuit had jurisdiction over the matter as an appeal from a final judgment. 28 U.S.C. §

1291. After briefing and oral argument, the court of appeal rendered its memorandum opinion and decree affirming the judgment on November 16, 1993. App., infra, A-1 - A-18. Diane Washington petitioned for rehearing which petition was denied on February 7, 1994. App., infra, A-41 - A42. The matter was sent back to the district court for filing of the mandate on March 7, 1994.

This petition for a writ of certiorari is made pursuant to 28 U.S.C. §1254 (1) and Supreme Court Rule 10. On May 7, 1994 Petitioner filed this petition in accordance with Supreme Court Rule 13.1 and Supreme Court Rule 29.2. The petition has been served on the respondent and the Solicitor General

pursuant to Supreme Court Rule 29.5 (b).

V.

ARGUMENT

A. Summary of Argument.

The memorandum opinion of the panel of the ninth circuit which decided this case essentially extends the *Feres* doctrine to bar claims by civilian victims. The court of appeal concluded a lawsuit involving tortious social activity of an off-duty serviceman might have a possible connection to the tortfeasor's military service, and thereby might cause an impermissible intrusion into military affairs. In so concluding, the court of appeal esssentially ruled the the *Feres* doctrine immunizes the United States of America from a suit

by a civilian where military government employees are negligent, even though such negligence might be actionable if the employees were private persons. This is contrary to decisions in the other circuits which do not apply the *Feres* doctrine in cases where the activity the victim was engaged in at the time of the injury is not connected to the victim's military service, regardless of whether the tortfeasor is in the military. Petitioner contends the *Feres* doctrine should not bar her claim because she was in a civilian status, was not engaged in any military activity, and was not availing herself of any benefit of her or anyone else's military service at the time she was injured. Petitioner submits this Court never

intended the *Feres* doctrine to bar a claim by a civilian under the Federal Tort Claims Act where that claim was not derivative of an injury to a serviceperson and the victim was not participating in any activity connected to her service at the time of the injury.

Further, it is unfair to treat civilians less equally than ex-servicepersons, or servicepersons on furlough, who have not been barred by the *Feres* doctrine from making claims for injuries which were not suffered during activity which was incident to, or arose out of, their service and yet which were caused by the negligence of active duty military employees in the course and scope of their employment.

Under the circumstances of this

case, the healthcare providers treating John Joseph would be subject to liability under California law if they were private persons for failing to diagnose the dangerous mental condition of the HIV positive patient and giving him advise on disclosure of his sexual condition to potential sex partners which was contrary to California law and their own regulations. Similarly, a private employer who failed to follows its own health rules concerning employees, or a negligent good samaritan who increased the risk of harm to a victim can be held liable under California law even where a concurrent tortfeasor commits intentional conduct. Therefore, it is not unfair to permit petitioner to make a claim. 28 U.S.C. §2674.

Although, the facts have not yet been fully developed, it appears petitioner might prevail on all these theories.

Petitioner's suit is not dependent on her status as a reservist nor does it depend on any military activity of John Joseph, who was engaged in decidedly nonmilitary activity when he injured petitioner. John Joseph worked as a journalist in the military. Petitioner's suit does not call into question any military decisionmaking. The mandatory regulations at issue involved no discretion and are common sense health rules not military matters. The medical negligence theory involves questioning medical decision making which is not peculiar to the military and which has been held

actionable in the past. The good samaritan theory depends on the assumption of a duty arising out of a voluntary decision to get involved in, and exercise some control over, the off duty life another serviceperson, which was not part of a military mission.

If the United States is immune for injuries it causes civilians who are unrelated to injured military persons that is a matter which should be decided by Congress, not on a case by case basis by courts. The degree of the fear of judges to intrude on matters allegedly military may vary greatly as may their particular ideas of what is military activity. Civilians should not be barred from suing under the Federal Tort Claims Act just because the negligent

government employee at issue was wearing a military uniform and claims some military purpose for his or her conduct. If the conduct of the tortfeasor is truly military, it will not pass the threshold test that it must be conduct for which a private person in the jurisdiction could be held liable. This Court should reaffirm that it is the status and activity of the victim that determines whether the *Feres* doctrine applies and reverse the decision of the court of appeal in this case.

B. The petition should be granted because the opinion of the ninth circuit conflicts with decisions on the scope of the *Feres* doctrine in other federal courts of appeal.

In petitioner's opinion, the first, fourth, fifth, seventh, eighth, eleventh and federal circuit courts of appeal would not have found the *Feres* doctrine barred her claim under their interpretations of the meaning of that doctrine.

In Lauer v. United States, 968 F.2d 1428, 1430 (1st Cir. 1992) the first circuit indicates that where the service person who is injured is engaged in activity which makes him no different than a member of the general public, the *Feres* doctrine does not apply. In this case the petitioner was hurt while on her own time and while socializing.

In Romero v. United States, 954 F.2d 223 (4th Cir. 1992) the fourth circuit considered a case involving alleged medical malpractice occurring

in California where the victim was the civilian child of a seviceperson. The government claimed the Feres doctrine barred the action by the child because the mother was a serviceperson who was treated by military doctors because of the mother's right to military benefits (i.e., military status). The government contended that even if Feres did not directly bar the claim (because the victim was a civilian) the "genesis" of the claim related to the treatment of a serviceperson and so it could not be maintained because of potential effects on military operations. The court in Romero, supra, at 226, held the Feres doctrine did not bar the child's claim because "no serviceperson was injured" and because the government

had breached an affirmative duty of care owed directly to the civilian victim. In analyzing the alleged impact on military discipline (i.e., criticism of the doctors) the Romero court stated: "Finally, it is not likely that a suit alleging military medical negligence inflicted on a civilian child will impair the discipline necessary for effective service." Ibid. The same is true concerning the criticism of the doctors which might arise in this case.

In Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) reh. den. 615 F.2d 919 (5th Cir. 1981), the fifth circuit concluded a serviceperson who was injured while on base engaged in activity relating to moving himself off base was not

barred from bringing a claim by the *Feres* doctrine from based on the negligence of the military employees. Arguably the activity in Parker had a greater connection to the military than the activity involved here.

In the recent case of M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992) the seventh circuit held the *Feres* doctrine did not bar an ex-seviceperson's emotional distress tort claim against the United States for failing to inform her she had been misdiagnosed as being HIV positive while in the service. The Army doctors in M.M.H. discovered after the plaintiff was discharged that the plaintiff was not HIV positive but did not tell her. After citing numerous precedents, the

M.M.H. Court concluded military discipline and effectiveness would not be inhibited by allowing a suit against the United States for the harm suffered: "Actions based on post-discharge negligence have equally little effect on military discipline or effectiveness whether or not the original tort was intentional or negligent." Id. at 289 n. 3.

On duty military lawyers are also not protected by the *Feres* doctrine if they negligently injure civilians. In Mossow v. United States, 987 F.2d 1365 (8th Cir. 1993) the eighth circuit held a military lawyer could be sued for negligently failing to inform a civilian child of the child's right to bring a medical malpractice action. The government

raised the doctrine as a bar to the child's claim for malpractice because the child's parents were in the service and received the legal advice as part of their military benefits. Id. at 1367. The Mossow Court disagreed and held the child's malpractice claim did not flow from negligent advice given to his parents who were servicepersons. Id. at 1369-1370. Concerning the military discipline issue the Mossow Court states: "A suit brought by a civilian alleging negligent legal advice would 'not require the court to second-guess a decision of the military necessary to the accomplishment of military mission.' (cite omitted)." Id. at 1370. A suit alleging tortious sexual activity of an off duty serviceman

and negligent medical treatment and advice given to that serviceman could also not conceivably interfere with a military mission. If John Joseph and the other negligent actors involved in this case had been members of the U.S. Postal Service the same potential liability would be present. They just happened to be in the military.

In Durant v. Neneman, 884 F.2d 1350, 1354 (10th Cir. 1989) the tenth circuit reasoned that driving to work was not a military act and held the *Feres* doctrine did not bar the claims of servicemen (who were on duty and engaged in a military physical training activity) who were run into by another active duty serviceman who was on his way to to a duty assignment.

Compare Quintana v. United States, 997 F.2d 711, 712 (10th Cir. 1993) (where the court held that because the inactive reservist was injured while availing herself of a military healthcare benefit which she would not have enjoyed but for her military status, the claim arose out of her service and was barred).

The *Feres* analysis employed by the eleventh circuit court of appeal would also have led to a different result in this case. In Kitowski v. United States, 931 F.2d 1526, 1528-1529 (11th Cir. 1991) the court identified three factors to be considered in deciding whether the *Feres* doctrine applies all of which relate to the status of the victim at the time of the injury: the duty status of the injured

servicemember at the time of the injury (here inactive and off duty), the place where the injury occurs (here off-base), and the activity the serviceperson was engaged in at the time (here sexual intercourse).

In Johnson v. United States, 810 F.Supp. 7 (D.D.C. 1993) the district court in the federal circuit held a serviceperson could make a claim against the United States under the Federal Tort Claims Act where military health care providers at an Army sponsored blood drive negligently misdiagnosed her as HIV positive. The government raised the *Feres* doctrine as a bar to the claim contending the misdiagnosis occurred "incident to service". The government argued the blood drive

should be considered a "military activity", in part because the blood drive was held pursuant to an Army regulation. Id. at 9. The Johnson court rejected that reasoning in holding that the *Feres* doctrine did not bar the claim. The Johnson court found participation in the blood drive was "essentially a civilian activity" and that the plaintiff's claim would not impinge on military discipline or effectiveness. Id. at 10. In Bembenista v. United States, 866 F.2d 494, 497-498 (D.C. Cir. 1989) the federal circuit followed Sheridan in finding that negligence which goes beyond a simple failure to supervise can result in liability for the

government under the Federal Tort Claims Act even where the conduct of the primary tortfeasor is intentional.

It also seems clear from a recent reported opinion from the ninth circuit, that the reasoning of the panel which decided this case is not universally shared in the ninth circuit. In Green v. Hall, 8 F.3d 695, 699-700 (9th Cir. 1993), a different panel of the ninth circuit held an inactive reservist, who had not yet reported to duty but was on his way, and who was injured in a car accident, was not barred by the *Feres* doctrine from bringing a claim because his injury was not suffered incident to service. Like petitioner, the plaintiff in Green was essentially a civilian and was

not availing himself of any benefit of service at the time he was injured and so *Feres* did not apply. Sex is no more military an activity than is driving to work.

The scope of the *Feres* doctrine is an issue of national importance. The test applied to determine whether the *Feres* doctrine applies should be the same in every circuit so a victim who suffers an injury while in a civilian status, and while not availing herself of any military benefit, will not be denied compensation simply because she lives in a circuit which interprets the *Feres* doctrine expansively. This Court can resolve the conflicts which exist among the circuits by granting this petition for certioriari and clarifying the

law on the scope of this troubled exception to the Federal Tort Claims Act and indicating just how it is to be applied, if at all, when the victim is a civilian.

C. The petition should be granted because the decision of the ninth circuit conflicts with the reasoning of this Court's opinions in United States v. Brown and Sheridan v. United States.

Diane Washington was in a civilian status when she was injured on January 22, 1989. The fact that she had or has some connection to the military because of being in the reserves is irrelevant. In United States v. Brown, 348 U.S. 110, 111-112 (1954) this Court held a former serviceman could recover against the veterans hospital

which injured him despite his previous military service because at the time he was injured he enjoyed a civilian status. The negligent government employees at issue in Brown were military doctors. Similarly, reservists like Diane Washington who are injured on their own time should have no fewer rights than other civilians under the Federal Tort Claims Act.

In Sheridan v. United States, 487 U.S. 392, 401 (1988) this Court did not directly address the *Feres* doctrine when it held civilians assaulted by an off duty serviceman, who was allowed by on duty servicemen to leave a military hospital with a loaded rifle in violation of mandatory

regulations, could bring a claim in negligence against the United States. It is implicit in the Sheridan holding however, that the *Feres* doctrine does not bar such a claim by a civilian. It is clear the allegedly negligent on duty government employees involved in Sheridan were part of the military and that the regulations which were violated were issued by the military. The regulations in Sheridan, like the mandatory regulations at issue here, inured to the benefit of the victim.

Earlier ninth circuit opinions were in accord with Sheridan. In Dogget v. United States, 875 F.2d 684, 691-693 (9th Cir. 1989) the

court held the government could be liable in negligence if a military security guard violated applicable mandatory regulations and allowed an intoxicated serviceperson to drive off the base and ultimately injure a civilian. The Dogget court also reasoned under California law a good samaritan theory of liability might apply. Once the personnel involved assumed the duty to control the intoxicated person they had a duty not to negligently perform that function. Id. at 694. In Johnson v. United States, 704 F.2d 1431, 1439 (9th Cir. 1983) the ninth circuit held the *Feres* doctrine bar a claim by an off duty serviceman who was injured on the base while

he was moonlighting as a bartender allegedly because base regulations were not followed from bringing a claim under the Federal Tort Claims Act; See also Ordhal v. United States, 601 F.Supp. 96, 98-100 (where an off duty serviceman who was injured in the barracks while socializing with another serviceman because regulations were allegedly violated was permitted to make a claim).

Both Sheridan and Dogget were decided after United States v. Shearer, 473 U.S. 52 (1985), on which the panel in this case relies. The Sheridan decision mentions Shearer and yet did not find the Shearer interpretation of the *Feres* doctrine prevented the claims made by the civilians claims based on the

military government employees' negligence at issue. In United States v. Shearer, 473 U.S. 52 (1987) this Court held the representative of an active duty full time serviceman (who was off duty at the time of the incident) who was murdered by another full time active duty serviceman (who was off duty at the time of the murder) could not bring a claim under the Federal Tort Claims Act against the United States based on the failure of the military persons involved to warn the victim or properly supervise the assailant. Id. at 57-59. Petitioner submits the Shearer case is inapposite to the instant case and, to the extent it isn't, the contrary

reasoning in the later decided Sheridan case should be followed in this case.

Unlike the plaintiff in Shearer, Diane Washington does not seek to hail military officials into court to question military orders they allegedly negligently gave or negligent acts they allegedly committed while involved in the course of a "military" function. The regulation at issue here is public health related. She also does not claim John Joseph's superiors were required to supervise his off duty sexual activity except in the context of some voluntarily assumed duty which they would otherwise not have and does not claim they never should have hired him or should have thrown Him out of the service if he

was HIV positive. The disciplining of John Joseph was handled by the military courts and is not an issue in this case any more than it would be in any tort suit where the tortfeasor was also prosecuted for criminal conduct.

The tortious conduct of the on duty government employees involved in this case relates essentially to the failure to provide properly diagnose, and treat, and advise an obviously mentally disturbed AIDS victim. There will be no second guessing of any "military" decisions in this case. The decisions and skill of the military health care providers involved, will be questioned. However, even in the ninth circuit, such questioning has been held permissible

in claims brought under the Federal Tort Claims Act based on California law by victims of dangerous patients who were allowed to run amok without warning. See, e.g., Jablonski v. United States, 712 F.2d 392, 399 (9th Cir. 1983). Sheridan teaches that where an assault is the result of the tortious conduct of two parties (even where one torfeasor's conduct is intentional) the plaintiff should not be prevented from making a claim against the negligent tortfeasor. This is consistent with California law under which a plaintiff only has to prove that the negligent conduct alleged was a substantial factor contributing to her injuries to recover. See generally Mitchell

v. Gonzales, 54 Cal.3d 1041, 1052-1053 (1992).

It seems apparent the psychiatric screening of John Joseph conducted in Oakland, California was inadequate in that it did not reveal he was unable, or unwilling, to deal with devastating condition in a responsible manner and was thereby a threat to society. "A negligent failure to diagnose dangerousness in a Tarasoff action is as much a basis for liability as a negligent failure to warn a known victim the diagnosis is made." Hedlund v. Superior Court, 34 Cal.3d 695, 703-704 (1983); See also Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal.3d 583, 590 n. 5 (1989) (where the California Supreme Court affirms

health care providers owe duties to third parties who can forseeably be hurt by their patients).

Further, a health care provider in California in 1988 who told an HIV positive patient in California that the the patient has the right to decide whether to tell his potential sexual partners is HIV positive is not only arguably below the standard of care which requires he try to prevent the spread of communicable diseases, California Health & Safety Code §3110, but would (albeit possibly unwittingly) be encouraging the patient to violate the fraud law. Kathleen B., supra, at 997.

If the government is analogized to a private employer rather than a doctor, hospital or health care

provider, it could also could be held liable under the circumstances of this case. In Coffee v. McDonnell Douglas Corp., 8 Cal.3d 551, 554-556 (1972), a corporate employer established a rule which required preemployment physicals and which required tests as part of those physicals. Test results done on the prospective employee involved in Coffee showed a high sedimentation rate which would have revealed myeloma, but those results were never communicated to the physicians who examined the employee owing to negligence of corporate administrative personnel and these physicians did not otherwise discover his condition. After being hired as a pilot the prospective employee suffered severe exhaustion

and complications after a long flight and was diagnosed as having myeloma. In a trial where the physicians doing the physical were sued for malpractice and the company was also sued for negligently failing to have communicated the test results, the jury found the physicians not liable, but held the corporate employer liable for its own negligence in failing to properly perform the duties it had voluntarily assumed concerning ascertaining its employee's physical condition. If the employee in Coffee crashed his plane into the highway because of his undiagnosed condition, the employer would at least arguably be liable to forseeable injured victims. See also Molsbergen v. United States, 757 F.2d 1016, 1019 -

1020 (9th Cir. 1985) (where the ninth circuit, after finding the *Feres* doctrine did not bar the claim of the ex-serviceperson claimant, found the employer had a duty under California law to warn the ex-employee about possible radiation exposure he may have suffered while he was employed.)

Under California law, like the Maryland law at issue in Sheridan, a person who undertakes to be a good samaritan and does so negligently can be held liable to a victim whose risk of harm was increased by the negligence or who justifiably detrimentally relied on the protection being offered. See generally Lopez v. Southern California Transit Dist., 40 Cal.3d 780, 788-789 (1985) . In this case,

it is possible what Commander Schamp did when confronting John Joseph with the information provided by John Joseph's wife increased the risk of harm to petitioner. If he, like the Navy personnel in Oakland, counseled John Joseph that it was alright to continue to sleep with women without telling them first that he was HIV positive, that may possibly have have been negligent legal advice as well as bad medical advice.

This petition should be granted to decide whether the United States of America is entitled to the absolute immunity given it by the ninth circuit given the seemingly contrary past precedent of this Court and the contrary language in the Federal Tort Claims Act as passed by Congress.

D. The petition should be granted because it is unfair to prevent civilians, who are not eligible for benefits such as those provided to injured military personnel and their families, from seeking compensation from the United States under the Federal Tort Claims Act simply because the tortfeasors are in the military.

In Feres v. United States, 340 U.S. 135 (1950) one of the reasons this Court found it was not unjust to deprive military persons, or their families, injured while engaged in activity incident to service is that the victim, or the victim's family, are entitled to no fault disability or death benefits for such injuries under statutes other than under the Federal Tort Claims Act.

This same rationale applies to reservists who are injured while on duty and are therefore eligible for such compensation. Mattos v. United States, 412 F.2d 763 (9th Cir. 1969).

Arguably, although less clearly, it is also not entirely unfair to deny compensation to servicepersons, or family members of servicepersons, who suffer harm arising out of benefits available because of an active military member's service, such as when receiving the benefit of health care provided at a military installation. See, e.g., Estate of McAllister v. United States, 942 F.2d 1473, 1478 (9th Cir. 1991) (where an active duty serviceperson receiving counseling from military doctors committed suicide and his family could not recover). However, there

is no equity whatsoever in denying Diane Washington her rights as a civilian under the Federal Tort Claims Act in this case. She has already been told she is not entitled to the benefits referred to in *Feres* because her injury is not service connected. That determination was correct under the applicable statutes because she was a civilian engaged in a civilian activity when she was hurt. 38 U.S.C. §1131; 38 U.S.C. 1133 (b); 38 U.S.C. §101 (16), (24).

The unfairness of preventing Diane Washington from making a claim under the Federal Tort Claims Act because of the *Feres* doctrine is evident when one compares cases where servicepersons who were off duty, furloughed, or discharged have been allowed to sue under the Federal Tort

Claims Act where the negligent conduct of the active duty military tortfeasors was deemed not so "military" in nature, or so connected to their service, as to invoke the *Feres* immunity. Some of this negligence is not unlike the negligence Diane Washington has alleged, or can allege if given leave to amend her complaint. Many of these cases are discussed above; additional cases are summarized briefly below.

An ex-military claimant who suffered further injury after discharge relating to an injury suffered incident to service could make a claim. Targett v. United States, 551 F.Supp. 1231 (N.D.C.A. 1982))

An ex-military claimant who was falsely imprisoned on a military base by military employees could make a claim. McGowan v. Scoggins, 890 F.2d 128 (9th Cir. 1989).

Ex-military claimants injured in a military hospitals can sue. Watt v. United States, 246 F.Supp. 386 (D.C.N.Y 1965); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973)

Off duty claimants injured when they were run into by a vehicles driven by on duty military persons were found have cognizable claims. Downes v. United States, 249 F.Supp. 926 (E.D.N.C 1965) (which accident occurred on the base); Hand v. United States, 260 F.Supp. 38 (M.D.G.A. 1966); Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974)

Off-duty servicepersons injured

when planes piloted by on duty military personnel crash can make claims despite the arguably military missions which the employees were pursuing at the time of the crashes. Synder v. United States, 118 F.Supp. 585, aff'd in part, rev'd in part, 218 F.2d 266 (4th Cir. 1984), rev'd on other grounds 350 U.S. 906 (1955); Sapp v. United States, 153 F.Supp. 496 (W.D.L.A. 1957)

While some of the above-referenced cases are arguably somewhat dated, they illustrate that the United States of America is not automatically free from liability even where the plaintiff has, or had, a connection to the military and the tortfeasors are in the military. In many of the above cases it is

likely the decisions of negligent military persons involved their seemingly military tasks involved may have been called into question in some respect in a civil suit alleging negligence. In all of these cases the courts were able to reach a just result within the limitations imposed by the *Feres* doctrine by focusing on the status of the victim at the time of the injury in determining whether the claim is incident to service.

This Court has indicated the lines drawn by an incident to service test as applied to the victim are appropriate. In United States v. Stanley, 483 U.S. 669, 683 (1987). In Stanley the relatives of an active duty military person subjected unknowingly to LSD experiment as part of some military mission was barred

from recovering under the Federal Tort Claims Act by the *Feres* doctrine because the victim suffered his injury, knowingly or not, as part of his military service. In this case the victim, Diane Washington, was not part of a military experiment.

The United States should not be immune in this case because of the duty status of employees of the defendant any more than it was immune to the civilians in Sheridan where the negligence of the on duty military personnel dealing with an on duty servicepersons was a basis for liability. Negligent on duty military tortfeasors will always arguably be doing something incident to their service while on duty (Durant, supra, at 1354), whether it be driving down a public highway,

providing medical treatment or advice, or practicing law, or directing traffic. This is especially true during peacetime. Where a civilian is injured because of the breach of a duty owed by a government military employee owed to the civilian such conduct can give rise to liability if the same as if they were private persons, and the *Feres* doctrine does not, and should not, bar the claim. Mossow, supra, at 1368.

VII.

CONCLUSION

Where injuries are not caused by a claimant's service except in the sense all human events depend on what has already transpired, the *Feres* doctrine should not bar a claim brought under the Federal Tort Claims

Act. In this case, Diane Washington should not lose her civilian rights because at times she provided service to the United States as a reservist. The *Feres* doctrine should not be extended to bar claims by civilians just because the allegedly negligent government employees are in the military especially where the conduct at issue is related to disease control and public health and not military action. Diane Washington requests the Court grant her petition for a writ of certiorari and provide much needed clarification on the scope of the *Feres* doctrine exception to the Federal Tort Claims Act.

Respectfully submitted,

Dated: 5/7/94 (ORIGINAL DATE) Sean T. O'Bryan

Sean T. O'Bryan,
Counsel of Petitioner

APPENDIX

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE WASHINGTON,	)	
	)	
Plaintiff-Appellant,	)	No. 92-56330
	)	
v.	)	D.C. No. CV-91-1246-G(BTM)
	)	
UNITED STATES OF AMERICA; H. LAWRENCE GARRETT III,	)	
	)	
Defendants-Appellees	)	MEMORANDUM*
	)	

Appeal from the United States District Court for the Southern District of California Earl B. Gilliam, District Judge, Presiding

Argued and Submitted June 11, 1993
Pasadena, California

Before: TANG, FLETCHER and POOLE, Circuit Judges.

Diane Washington, a naval reservist, appeals the district court's order dismissing her action against the United States which alleges that she contracted

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

HIV from an HIV-positive sailor as a result of the negligence of naval personnel. Because her suit is barred by the Feres doctrine, we affirm.

FACTS AND PROCEDURAL HISTORY

The following facts are undisputed unless otherwise noted.

Diane Washington, a member of the United States Naval Reserve who worked part-time as a journalist for the Navy,[1] met Petty Office John Joseph in December 1988. They became friendly as a result of working in the same office and, on January 22, 1989, Washington engaged in sexual intercourse with Joseph at Joseph's off-base apartment. Washington insisted that Joseph use a condom because she feared pregnancy, but the condom broke during the

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[1]Apparently, she held this job in a civilian capacity.

sexual act. This was the only time Washington had sex with Joseph.

In July 1989, Washington was informed by the Navy that at her annual screening she had tested positive for HIV, the virus that causes AIDS. Washington, who had always before tested negative, had not had intercourse with anyone besides Joseph since her last negative test. After the positive test result was revealed to her, Washington was ordered pursuant to SECNAVINST 5300.30B to disclose her HIV-positive status to all potential sexual partners.

The Navy had transferred Joseph from a post in Hawaii to one in Oakland when it had been discovered that he was carrying HIV, approximately one year before his contact with Washington. In Oakland, Joseph had been medically evaluated and counseled regarding his HIV-positive

status, but had never been issued a so-called "safe-sex" order of the sort Washington received. Following his medical evaluation, Joseph had been retained on active duty.

The parties sharply dispute, with some evidence on each side, whether a "safe sex" order was required as part of standard Navy procedure at the time Joseph received counseling. In any event, there is no doubt that Joseph knew of his HIV infection at the time he had intercourse with Washington and that he withheld this information from her, to her grave detriment. Washington claims she would not have had intercourse with Joseph had she known he was HIV positive.

At Washington's request, the Navy commenced an investigation into the matter. The investigation revealed that in November 1988 Joseph's wife had called

Joseph's commanding officer, Douglas Schamp, and informed him that Joseph was pursuing sexual liaisons with other women without telling them he was carrying the AIDS virus. Commander Schamp called in Joseph to speak with him about this allegation, but Joseph denied any wrongdoing. Apparently Schamp chose not to intervene further.

As a result of the Navy's investigation, Joseph was court-martialed and convicted of aggravated assault. His conviction was upheld by a court of military review. United States v. Joseph, 33 M.J. 960 (N.M.C.M.R. 1991). One of Joseph's defenses at the court-martial proceeding was that he had never been issued a "safe sex" order--that "[h]e wasn't ordered to do or not do anything." Counsel's argument at court martial.

Washington brought suit against the United States in the Southern District of California under the Federal Tort Claims Act (FTCA), asserting that her contraction of HIV was the result of the Navy's negligence in failing to issue a "safe sex" order to Joseph. After hearing the government's motion to dismiss, Judge Gordon Thompson, in a written disposition, held that Washington's suit was barred by the Feres doctrine, and dismissed the case without prejudice. Rather than appealing Judge Thompson's dismissal, Washington filed another complaint, this time acting pro se. Her second case was assigned to Judge Gilliam.

Washington's second complaint was virtually identical to her first except that she added H. Lawrence Garrett III, Secretary of the Navy, as a defendant, and included new allegations concerning the

non-service-connected nature of her injury and the Navy's safe-sex policy.[2] The government brought another motion to dismiss, arguing that the case was barred by the doctrine of res judicata and that Garrett was not a proper defendant under the FTCA, which authorizes suits only against the United States. Judge Gilliam granted the government's motion as to Garrett but denied it as to the United States, ruling that "plaintiff may have a viable claim under the Federal Tort Claims Act (because) California law recognizes that a defendant has a duty to control a

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[2] Although on appeal Washington suggests that the United Stated could be held liable for medical malpractice, as a negligent volunteer, or for failure to warn, none of these alternate bases for liability is pleaded in her complaint, which alleges only general negligence in failing to inform Joseph of his responsibilities to potential sexual partners and negligent supervision in neglecting to issue a "safe sex" order.

third party's conduct if 'the defendant stands in some special relationship to . . . the [third party] whose conduct needs to be controlled.'" May 15, 1992 Order of District Court.[3] The brief order did not discuss either the effect of Judge Thompson's dismissal of Washington's earlier action or the Feres doctrine.

Washington, having again retained counsel, commenced discovery in the case. However,. shortly after Washington had been allowed additional discovery by a magistrate judge, Judge Gilliam entertained a renewed motion to dismiss by the government. In ruling on this motion, Judge Gilliam noted that he had "wanted to

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[3] Under the FTCA, the United States, with some exceptions, is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. Section 2674. Liability is therefore determined with respect to state law. Doggett v. United States, 875 F.2d 684, 686 (9th Cir. 1989).

make sure that the plaintiff had every opportunity to get her allegations before the court," but that Judge Thompson's determination on the Feres question constituted the "law of the case." Reporter's Transcript of October 5, 1992 Hearing at 11. Turning briefly to the merits, Judge Gilliam found that although the Navy had adopted a "safe sex" policy as of December 15, 1988, that policy had not been implemented until February 1989, "and in between those two dates the problem that the plaintiff was having occurred." Id. Accordingly, Judge Gilliam orally granted the government's motion to dismiss on the ground that Washington had failed to state a cause of action.[4]

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[4] The government's motion sought dismissal or, in the alternative, summary judgment. When the court ordered the case dismissed it did not say whether it was

It is this order that Washington appeals.[5]

DISCUSSION

A district court's dismissal for failure to state a claim or for lack of subject matter jurisdiction is a question of law that is reviewed de novo. Oscar v. University Students Co-Operative Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 655 (1992); Atkinson v. United States, 825 F.2d 202, 204 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988). A grant of summary judgment similarly is reviewed de novo. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570 (9th Cir. 1990).

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also granting summary judgment.

[5] Washington does not challenge Judge Gilliam's earlier order dismissing Garrett from the case.

The Navy maintains that Washington's suit is foreclosed because, under principles of res judicata, she is bound by Judge Thompson's ruling in the first case that the action is barred by Feres and because, in any event, the action cannot survive Feres.[6] Washington contends that Judge Thompson's ruling is not dispositive and asserts that because she was "in her civilian status" at the time she was injured and because she is "not entitled to any government benefits mentioned as alternative compensation in Feres," her action is viable. Br. of Appellant at 31.[7]

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[6] The Navy also raises various state law defenses to Washington's FTCA claims.

[7] Washington also asserts that she was improperly denied leave to amend her complaint and the opportunity to develop additional evidence. A district court's denial of leave to amend is reviewed for abuse of discretion, Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir.

The Feres doctrine is an ever-expanding, judicially created exception to the broad waiver of sovereign immunity represented by the Federal Tort Claims Act. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that members of the armed services could not maintain actions against the United States for injuries that "arise out of or are in the course of activity incident to

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1991), as is aa refusal to permit further discovery, Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272, 1276 (9th Cir. 1991). Although Washington claims to have requested leave to amend in her opposition papers to the government's renewed motion to dismiss, we have not located any such request in renewed motion to dismiss, we have not located any such request in the cited document; nor, apparently, did she ask for leave to amend at the hearing. In any event, the district court would not have abused its discretion in denying leave to amend the complaint since, as we explain below, Washington's suit is barred by Feres. This is so notwithstanding the fact that the magistrate had granted Washington's request for additional discovery.

service." Id. at 146. The three stated rationales underlying the Feres doctrine, as expounded in Feres and subsequent cases, are: "(1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure." Atkinson, 825 F.2d at 204.

The negligence Washington alleges, and the gravamen of her suit, is the failure to issue an appropriate military order to Joseph. The action thus implicates the third asserted rationale for Feres, the need to protect the military disciplinary structure from judicial "second-guessing."

See Stauber v. Cline, 837 F.2d 395, 398 (9th Cir.) (discussing disciplinary rationale), cert. denied, 488 U.S. 817 (1988). Because the resolution of Washington's claim would necessarily subject the Navy's actions (or inactions) surrounding Joseph's misconduct to judicial scrutiny, the suit cannot be maintained.

We agree with the Navy that the Supreme Court's decision in United States v. Shearer, 473 U.S. 52 (1985), is controlling in this regard. In Shearer, Army Private Vernon Shearer was off-duty and away from base when he was kidnapped and murdered by another serviceman, Andrew Heard. Shearer's mother brought suit under the FTCA, alleging that the Army had been negligent because it knew that Heard was dangerous and yet had "'failed to exert a reasonably sufficient control

over' him and 'failed to warn other persons that he was at large.'" Id. at 53-54. The Court held that Feres barred the action because it would entail the "hal[ing] [of] Army officials into court to account for their supervision and discipline of Private heard," id. at 59, explaining that

> [t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct.

Id. at 58 (emphasis added). The Ninth Circuit has adhered to the Shearer rationale in upholding the dismissal of a wrongful death action which alleged that the military was negligent in its supervision of a schizophrenic patient who killed an off-duty serviceman. Estate of

McAllister v. United States, 942 F.2d 1473, 1477-79 (9th Cir. 1991), cert. denied, 112 S. Ct. 1164 (1992).

Washington seeks to rely on Lutz v. Secretary of the Air Force, 944 F.2d 1477 (9th Cir. 1991), which was decided after Judge Thompson's dismissal of her first complaint. In Lutz, we held that Feres did not extend to an action brought by an air force major based on her subordinates' opening and dissemination of her private mail, as a result of which she was compelled to resign. Id. at 1484. In so holding, we observed that the subordinates' misconduct had not been the subject of military discipline and that the plaintiff was not asserting claims against the Air Forced for failure to take disciplinary action. Id. at 1484-85. These factors distinguish Lutz from the case at hand, and the distinction is a

critical one. Lutz itself notes that a claim for negligent supervision or one that otherwise challenges a military disciplinary decision "fall[s] squarely within the prohibited zone protected by Feres." Id. at 1485 n.8.

In sum, although the Navy may have failed to live up its own policy by failing to issue Joseph a "safe sex" order and perhaps should have investigated Joseph's sexual conduct when it received the phone call from his wife rather than waiting until after he had infected a fellow service person with HIV, under the Feres doctrine as interpreted in Shearer and McAllister, those actions are immune from this court's "second-guessing." In light of our determination that the suit is barred by Feres, we do not address the

res judicata issue or the other grounds for affirmance urged by the Navy.[8]

AFFIRMED. FILED IN U.S. COURT OF APPEALS NOVEMBER 16, 1993

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[8] While it presents persuasive legal authority, in its repeated emphasis on the "consensual" nature of Washington's sexual contact with a man who apparently had no misgivings about risking her life, the government's brief is remarkably unsympathetic to the plight of someone who did nothing wrong and certainly should not be blamed for her condition.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DIANE WASHINGTON, Plaintiff, v. THE UNITED STATES OF AMERICA, et al., et al., Defendants.	Case No.911246G (BTM) ORDER

ORDER

Having considered the Renewed Motion to Dismiss or, in the Alternative, for Summary Judgment of Defendant, the United States of America, the opposition thereto, and the entire record in this case, and having heard oral argument on October 5, 1992, it is hereby

ORDERED that the Motion to Dismiss is granted.

Date:_____

/s/ EARL B. GILLIAM
UNITED STATES DISTRICT
JUDGE

FILED OCTOBER 23, 1992

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Dated: 10/14/92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DIANE WASHINGTON, PLAINTIFF,	CASE NO. 91-1246-G-CIVIL
vs.	
UNITED STATES OF AMERICA ET AL., DEFENDANTS.	SAN DIEGO, CA OCTOBER 5, 1992 10:30 A.M.

BEFORE HONORABLE EARL B. GILLIAM,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(MOTIONS HEARING)

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SAN DIEGO, CALIFORNIA - MONDAY, OCTOBER 5, 1992 - 10:30A.M.

* * *

THE CLERK: NO. 26 ON CALENDAR, CIVIL CASE NO. 91-1246-G, DIANE WASHINGTON VERSUS UNITED STATES OF AMERICA, ET AL., FOR HEARING DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY FOR SUMMARY JUDGMENT AS TO THE UNITED STATES OF AMERICA.

MR. O'BRYAN: SEAN O'BRYAN ON BEHALF OF THE PLAINTIFF, DIANE WASHINGTON.

MR. BOUDREAUX: YOUR HONOR, THIS IS ANOTHER CASE UNDER THE FEDERAL TORT CLAIMS ACT. THE PLAINTIFF ALLEGES SHE CONTRACTED THE HUMAN IMMUNO DEFICIENCY VIRUS THROUGH CONSENSUAL INTERCOURSE WITH A FELLOW SERVICEMAN OF THE UNITED STATES NAVY, JOHN JOSEPH, IN JANUARY 1989. MR. JOSEPH IS NOT THE PLAINTIFF. THE PLAINTIFF CONTENDS THAT THE GOVERNMENT IS RESPONSIBLE TO ISSUE SAFE SEX ORDERS TO MR. JOSEPH, IN

ADDITION TO THE COUNSELING AND INSTRUCTION THAT WAS PROVIDED HIM.

THE UNITED STATES MADE THIS MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT. THIS IS THE SECOND DISPOSITIVE MOTION IN THIS CASE. AS THE COURT MAY RECALL, THE UNITED STATES PREVIOUSLY MOVED TO DISMISS SOLELY ON THE GROUNDS OF RES JUDICATA. THAT WAS PURELY A THRESHOLD MOTION, WHICH THE COURT HAS DENIED. IN THIS CURRENT MOTION THE UNITED STATES CONTENDS THAT THE UNITED STATES IS NOT LEGALLY RESPONSIBLE FOR PLAINTIFF'S CONTRACTION OF THE H.I.V. ON FIVE GROUNDS:

FIRST, THE FERES DOCTRINE. THE UNITED STATES HAS SHOWN THAT THERE WAS NO REGULATION AS ALLEGED BY PLAINTIFF REQUIRING SAFE SEX ORDERS BEFORE 1989.

THIRD AND FOURTH, THE UNITED STATES SHOWS THERE WAS NO DUTY under California STATE LAW FOR THE NAVY TO ACT IN THE

MANNER THE PLAINTIFF CONTENDS. IF THERE WAS SUCH A DUTY, THE NAVY FULFILLED THAT DUTY BY THE COUNSELING AND INSTRUCTIONS UNDENIABLY PROVIDED.

FIFTH, THE PLAINTIFF CANNOT SUE UNDER THE FEDERAL TORT CLAIMS ACT BECAUSE DECISIONS ON HOW TO SUPERVISE AND DISCIPLINE ARE DISCRETIONARY FUNCTIONS OF GOVERNMENT.

THE FIRST AND MOST FUNDAMENTAL IS THE FERES DOCTRINE, PARTICULARLY AS APPLIED BY THE SUPREME COURT IN THE CASE OF UNITED STATES VERSUS SHEARER.

IN SHEARER, THE SUPREME COURT EXTENDED FERES TO PROHIBIT MILITARY SERVICEMEN FROM SAYING THAT THE MILITARY NEGLIGENTLY SUPERVISED OR DISCIPLINED A SERVICE MEMBER, AND THAT SUCH NEGLIGENCE CAUSED THE SERVICEMEMBER TO INJURY THE PLAINTIFF.

HERE, AS IN SHEARER -- THERE WAS A CASE WHERE A SERVICEMEMBER MURDERED ANOTHER SERVICEMEMBER OFF DUTY, NOT ON BASE, BUT THE PLAINTIFF WAS CHALLENGING HOW THE MILITARY DISCIPLINED AND SUPERVISED THE ORDER.

AND IN SHEARER, THE SUPREME COURT SAID THAT THE FERES DOCTRINE PROHIBITED SUCH ACTIONS, THAT A SERVICEMEMBER CANNOT GO INTO COURT AND CHALLENGE THE METHOD IN WHICH THE MILITARY HAS SUPERVISED AND DISCIPLINED SERVICEMEN.

THE PLAINTIFF HAS NOT CONTENDED THAT THE SHEARER CASE IS NOT ON POINT, RATHER IN PLAINTIFF'S PAPERS PLAINTIFF RELIES ON THE NINTH CIRCUIT DECISION THAT DID NOT CONCERN THE SHEARER BRANCH OF THE FERES DOCTRINE.

INDEED, IN LUTZ, FOOTNOTE 8, THE COURT CLAIMS FOR NEGLIGENT SUBSEQUENT SUPERVISION OR CHALLENGING DISCIPLINARY

DECISIONS HAVE BEEN FOUND TO FALL IN SQUARELY WITHIN THE ZONE PROTECTED BY FERES. ACCORDINGLY, SHEARER WAS DISPOSITIVE AND THE ACTION SHOULD BE DISMISSED IN ITS ENTIRETY.

SECOND, YOUR HONOR, THE UNITED STATES HAS SHOWN THAT PLAINTIFF'S FUNDAMENTAL ALLEGATION IS WRONG. THERE WAS NO SUCH SUPPOSED REGULATION BEFORE 1989 REQUIRING THE ISSUANCE OF SAFE SEX ORDERS, AND TO DATE PLAINTIFF HAS FAILED TO CITE ANY SUCH PURPORTED REGULATION.

BY CONTRAST, THE UNITED STATES PROVIDED AN AFFIDAVIT FROM A FORMER NAVY OFFICER, LIEUTENANT GERDING, WHO WAS INVOLVED IN THE DRAFTING OF NAVY POLICY WITH REGARD TO HIV, THE PERSON MOST LIKELY TO KNOW WHEN THE ORDERS WERE IMPLEMENTED.

UNDER THE LAW OF SUMMARY JUDGMENT AND RECENT SUPREME COURT AND NINTH CIRCUIT DECISIONS, A PLAINTIFF CAN DEFEAT A

SUMMARY JUDGMENT MOTION ONLY IF IT COMES FORWARD WITH EVIDENCE SUFFICIENT ENOUGH TO ALLOW A TRIER OF FACT TO RULE IN FAVOR, AND RELY ON ALLEGATIONS IN HIS COMPLAINT.

HERE THE UNITED STATES HAS PROVIDED EVIDENCE THAT PROVE THAT THESE REGULATIONS DID NOT EXIST, AND PLAINTIFF HAS NOT COME UP WITH ANY EVIDENCE TO ALLOW THE FINDING OF FACT TO FIND THERE WAS SUCH REGULATIONS THAT EXISTED.

THE ONLY EVIDENCE THAT PLAINTIFF HAS PROVIDED ARE TWO ANECDOTAL DECLARATIONS, NO ON POINT. THEY STATE THAT TWO PERSONS SAW INDIVIDUAL SAFE SEX ORDERS BEFORE 1989. THE QUESTION IS NOT WHETHER CERTAIN OTHER PARTICULAR INDIVIDUALS MIGHT HAVE ISSUED SAFE SEX ORDERS OR WHETHER THERE WAS A REGULATION ON POINT REQUIRING ALL INDIVIDUALS TO BE ISSUED SAFE SEX ORDERS. THERE IS NO EVIDENCE IN THIS RECORD TO ALLOW THE FINDER OF FACT TO FIND IN

PLAINTIFF'S FAVOR. SUMMARY JUDGMENT MUST BE ENTERED IN FAVOR OF THE UNITED STATES.

THIRD AND FOURTH, THE UNITED STATES HAS SHOWN THAT THE NAVY HAD NO DUTY TO TRY TO CONTROL THE PERSONAL SEX LIFE OF JOSEPH OR SOMEHOW WARN PEOPLE AROUND HIM OF HIS HIV CONDITION. IF SUCH A DUTY DID EXIST, THE NAVY FULFILLED THAT DUTY BY THE COUNSELING AND INSTRUCTION PROVIDED TO MR. JOSEPH.

IT IS SETTLED LAW THAT THE UNITED STATES IS TO BE TREATED LIKE A PRIVATE EMPLOYER; ACCORDINGLY, THERE CAN BE NO LIABILITY IN THIS CASE UNLESS A PRIVATE EMPLOYER FROM CALIFORNIA WOULD HAVE A DUTY TO TRY TO CONTROL THE PERSONAL SEX LIFE OF ANY OF ITS EMPLOYEES OR WARN THE PEOPLE AROUND HIM OF THE FACT THAT PERSON HAD THE HIV.

PLAINTIFF HAS RELIED ON THE TARASOFF DUTY, WHICH PRESUMABLY WOULD REQUIRE THE

NAVY TO GO AROUND WARNING PEOPLE THAT NAVY SERVICEMEN HAD HIV. TO REQUIRE SUCH A WARNING WOULD INTERFERE WITH THE CONFIDENTIALITY OF PERSONS WITH HIV, AND VERY WELL HAVE VIOLATED THE PRIVACY ACT, WHICH PROHIBITS DISCLOSURE OF THAT PERSONAL INFORMATION OF EMPLOYEES.

THE CALIFORNIA SUPREME COURT IN THE THOMPSON CASE CLARIFIED THAT THE TARASOFF DUTY APPLIES ONLY WHEN THERE IS A THREAT.

THE COURT: DID YOU WORK THIS CASE BEFORE? WERE YOU THE ATTORNEY BEFORE?

MR. BOUDREAUX: YES, YOUR HONOR.

THE COURT: ONE THING I THINK WE HAVE BEEN OVER IS YOU ARE CONCERNED ABOUT THE POLICY OF THE NAVY. ISN'T THAT THE MAIN ISSUE? THE MAIN ISSUE IS ABOUT THE POLICY. WE HAVE BEEN OVER ALL OF THE OTHER THEORIES BEFORE.

MR. BOUDREAUX: THERE ARE A NUMBER OF ISSUES. THE FERES IS THE FIRST THRESHOLD

THAT HAS TO BE DECIDED FOR THAT KIND A MOTION TO DISMISS. ALSO, UNLESS THERE IS A DUTY UNDER CALIFORNIA STATE LAW. THAT IS THE ARGUMENT I AM CURRENTLY DISCUSSING.

THE COURT: LET'S SEE WHAT PLAINTIFF'S LAWYER HAS TO SAY ABOUT IT.

MR. O'BRYAN: TO ADDRESS THE ISSUE THE COURT IS INTERESTED IN, THE REGULATION. THE PLAINTIFF HAS PUT BEFORE THE COURT SECRETARY OF NAVY INSTRUCTION 5300.B12B1A. THIS IS A MANDATORY REGULATION IN EFFECT IN DECEMBER OF 1988 WHICH STATES THAT PERSONS WITH HIV SHALL BE DIRECTED TO FOLLOW THEIR COUNSELING.

THAT IS EXACTLY WHAT IS GOING ON IN THIS CASE. THE NAVY FAILED TO DIRECT, FAILED TO ORDER JOHN JOSEPH TO FOLLOW HIS COUNSELING.

NOT ONLY THAT, THERE IS ADDITIONAL EVIDENCE PRESENTED THEY KNEW HE WASN'T

FOLLOWING HIS COUNSELING IN THE NATURE OF REPORTS TO HIS COMMANDING OFFICER BY HIS WIFE THAT HE WAS SLEEPING WITH PEOPLE AND NOT TELLING THEM HE HAD HIV.

THE COURT: WHEN WAS THAT ORDER IMPLEMENTED?

MR. O'BRYAN: DECEMBER 15TH, 1988. AND THE INJURY OCCURRED ON JANUARY 22ND, 1989.

AND THE EVIDENCE INDICATING THAT THAT POLICY DID REQUIRE AN ORDER IS THE FACT THAT PLAINTIFF'S SAFE SEX ORDER WAS ISSUED PURSUANT TO THAT REGULATION. THERE HAS BEEN NO CHANGE IN THE SUBSEQUENT REGULATION AS IT CHANGED ON MARCH 20, 1990. IT IS THE SAME LANGUAGE, DIRECTING THE HIV PATIENT TO FOLLOW HIS ORDERS.

AS TO FERES, FERES DOESN'T APPLY. PLAINTIFF WAS A CIVILIAN AT THE TIME OF THE INJURY. I BELIEVE THIS COURT HAS DECIDED THAT IN THE EARLIER MOTION. AT

THE TIME OF THE INJURY SHE WAS IN THE RESERVES. THE RESERVES ARE ONLY ON DUTY WHEN THEY ARE SCHEDULED FOR DUTY. SHE WAS NOT AT THE TIME OF THE Injury. FERES DOESN'T APPLY.

AND THERE ARE ADDITIONAL REASONS IT WOULDN'T APPLY IN THIS CASE. I GO INTO -- I THINK YOU MAY WANT TO HEAR -- DO YOU WANT TO THE HEAR ME ON THIS ISSUE?

THE COURT: IF YOU CARE TO?

MR. O'BRYAN: WELL, SIMPLY PUT, THE FERES POLICIES DON'T APPLY IN THIS CASE. FIRST OF ALL, THERE IS NO ALTERNATE METHOD OF COMPENSATION FOR THE PLAINTIFF. BY DEFINITION, SHE WAS NOT ON ACTIVE DUTY, SHE IS ENTITLED TO NO BENEFITS. SHE IS NOT PART OF THE SYSTEM THAT COMPENSATES MILITARY PEOPLE FOR INJURING OTHER MILITARY PEOPLE.

SHE WAS ALSO NOT SUBJECT TO MILITARY DISCIPLINE AT THE TIME OF THE INCIDENT.

UNIFORM CODE IN MILITARY JUSTICE PROVIDES THAT RESERVISTS ARE ONLY SUBJECT WHILE ON ACTIVE DUTY, SHE WAS NOT.

THIS ALSO DOES NOT IMPACT MILITARY DISCIPLINE IN AN IMPERMISSIBLE WAY. FIRST OF ALL, COUNSEL'S STATEMENT THAT THE LAW IS THAT NEGLIGENT SUPERVISION IS NOT A BASIS FOR LIABILITY IS NOT CLEAR.

THE SUPREME COURT IN THE FOOTNOTE IN SHERIDAN SAID WE DON'T DECIDE THAT, THE NINTH CIRCUIT SAID WE DO DECIDE THAT, WE DECIDE IN FAVOR OF THE PLAINTIFFS. THAT WASN'T A MILITARY CASE, SO FERES, THE POLICIES UNDERLYING FERES, DON'T APPLY.

AND IN LIGHT OF LUTZ WHERE THE COURT FOCUSES ON WHETHER THE INCIDENT CAUSING THE INJURY IS INCIDENT TO SERVICE, I SUBMIT TO THE COURT THAT SEXUAL RELATIONS NOT CONNECTED WITH ANY MILITARY FUNCTION AND NOT USING MILITARY PROPERTY OR

ANYTHING ELSE CONNECTED WITH THE MILITARY IS NOT WITHIN THE SCOPE OF SERVICE.

MR. BOUDREAUX: FIRST, ON THE FERES POINT. PLAINTIFF POINTS OUT THAT THE PLAINTIFF'[S INJURY IS NOT AN ACTIVE DUTY KIND OF INJURY. THAT WAS PRECISELY THE POINT IN SHERIDAN, OFF BASE, OFF DUTY, NOT A MAIN MILITARY EVENT.

THE FACT THAT THE LAWSUIT INVOLVED A MILITARY SERVICEMEMBER GOING IN AND SAYING THAT THE MILITARY WAS NEGLIGENT IN SUPERVISING ANOTHER SERVICEMEMBER, THE LAWSUIT ITSELF, NOT THE FACT THE INJURY WAS MILITARY, THE LAWSUIT ITSELF. THAT IS CLEAR ON SHEARER, AND THE LUTZ CASE CLARIFIED THAT THAT WAS THE LAW.

THE FACT THAT THE PLAINTIFF WAS NOT SUBJECT TO MILITARY DISCIPLINE AT THE TIME, SAME AS IN SHEARER. THE FACT THAT THE PLAINTIFF WAS RESERVIST, THAT IS NOT CORRECT. IT DOESN'T MEET THE OTHER CASES.

THE LAW IS CLEAR ACROSS THE COUNTRY, THE FACT THAT THE PLAINTIFF IF RESERVIST MAKES NO DIFFERENCE UNDER THE LAW OF FERES.

THE ARGUMENT POLICIES UNDERLYING FERES DO NOT APPLY, THE SUPREME COURT ARE NOT SUPPOSED TO LOOK AT EACH INDIVIDUAL CASE AND BALANCE THIS OR THAT AND SEE WHETHER THEY APPLY. INDEED, HERE THE PLAINTIFF IS RECEIVING CARE UNDER THE VETERANS ADMINISTRATION. I BELIEVE, ON THAT BASIC GROUNDS, IT IS RECEIVING SOME OF THE BENEFITS OF MILITARY SERVICE.

ONE FINAL POINT WITH REGARDS TO THE SUPPOSED REGULATION, PLAINTIFF'S FUNDAMENTAL ARGUMENT IS THAT ORDERS ARE DIFFERENT THAN INSTRUCTION, COUNSELING, ET CETERA. PLAINTIFF SAYS THERE HAVE TO BE ORDERS IN PRECISE MILITARY LANGUAGE SAYING, "YOU ARE HEREBY ORDERED."

PLAINTIFF'S COUNSEL ARGUES THAT PRECISE TERM OF ART IS DIFFERENT FROM

INSTRUCTION AND COUNSELING. IT IS CLEAR THAT IN THE DIRECT PART OF THE COUNSELING THEY ARE TO BE TOLD THEY SHOULD DO THESE THINGS. NO LANGUAGE REQUIRES THE WORDS THAT PLAINTIFF RELIES ON, WHICH IS THAT ORDERS SHALL BE IN PLACE.

HAVE AN AFFIDAVIT FROM THE PERSON THAT DRAFTED THE POLICY WITH REGARDS TO SAFE SEX, AND THERE WAS NO SUCH POLICY BEFORE FEBRUARY 1989.

PLAINTIFF RELIES ON THE FACT THERE IS DISTINCTION BETWEEN ORDERS IN CLEAR MILITARY TERMS AND OTHER THINGS SUCH AS COUNSELING AND INSTRUCTION. THE DOCUMENT PROVIDED BY PLAINTIFF IS CLEARLY REFERRING TO COUNSELING AND DOES NOT INVOLVE OR REQUIRE ORDERS.

THE COURT: GENTLEMEN, I HAVE BEEN OVER THIS CASE BEFORE, AND IT WAS MY THOUGHT THAT PERHAPS I WANTED TO MAKE SURE

THAT THE PLAINTIFF HAD EVERY OPPORTUNITY TO GET HER ALLEGATIONS BEFORE THE COURT.

NOW, WITH REFERENCE TO THE FERES DOCTRINE ADJUDICATION, THAT HASN'T BEEN APPEALED AND JUDGE THOMPSON MADE A RULING, SO THAT BECOMES THE LAW OF THE CASE.

THE AREA THAT I THOUGHT SHE SHOULD HAVE A CHANGE TO EXPLORE WAS THE POLICY BY THE NAVY REGARDING SAFE SEX ORDERS, BUT NOW WHAT I FIND IS THAT THAT WAS MADE A LAW OR POLICY DECEMBER 15TH, '88, AND THE NAVY DID NOT IMPLEMENT THAT POLICY REGARDING SAFE SEX UNTIL FEBRUARY '89, AND IN BETWEEN THOSE TWO DATES THE PROBLEM THAT THE PLAINTIFF WAS HAVING OCCURRED.

SO I THINK THAT IS FOR THE PROPOSITION I TOOK AT THIS TIME, AND I WILL GRANT THE MOTION TO DISMISS. AND I WILL HANDLE IT THAT WAY.

I THINK YOU SHOULD APPEAL THAT, COUNSEL.

MR. O'BRYAN: MAY I BRIEFLY ADDRESS THE REASONS UNDER THAT AS TO THE DATES?

THE PLAINTIFF HAS ALLEGED AND PRESENTED AN INSTRUCTION TO THE COURT THAT ON ITS FACE STATES THAT IT WAS IN EFFECT AS OF DECEMBER 15TH, AND DIRECTED TO ALL SHIPS AND ALL PERSONNEL.

THE DIRECTIVE ITSELF SAYS THAT THE SECRETARY OF THE NAVY AND SOME MEDICAL DIRECTOR, THE ONE THAT SETS POLICY, NOT THIS RESERVIST LIEUTENANT WHO FILED A DECLARATION WHICH IS CONTRADICTED BY STATEMENTS PRESENTED BY PLAINTIFF.

I THINK WHAT YOU HAVE IS AN ISSUE OF FACT WHETHER THAT REGULATION WAS IN EFFECT, AND AN ISSUE OF FACT ON A SUMMARY JUDGMENT MOTION SHOULD BE DECIDED IN FAVOR OF THE PLAINTIFF AND AGAINST THE MOVING PARTY IN THE CASE.

THE INSTRUCTION ITSELF CONSTITUTES SUFFICIENT EVIDENCE INDICATING THAT WAS

NAVY POLICY IN EFFECT AT THAT TIME. AND FOR THAT REASON A MOTION TO DISMISS SHOULD NOT BE GRANTED.

FURTHER, THE PLAINTIFF'S CASE IS NOT BASED SIMPLY ON THAT INSTRUCTION, IT IS ALSO BASED ON A FAILURE TO WARN.

THE COURT: THOSE WOULD BE ARGUMENTS FOR THE APPELLATE COURT. I WILL GRANT THE MOTION THE GOVERNMENT MAKES AT THIS TIME.

MR. O'BRYAN: CAN WE MAKE IT CLEAR?

THE COURT: IT IS CLEAR. I DISMISSED IT. YOU HAVEN'T STATED A CAUSE OF ACTION.

COUNSEL, YOU PREPARE THE ORDER, PLEASE.

MR. BOUDREAUX: YES, YOUR HONOR.

* * *

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ LEEANN PENCE
11/20/92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DIANE WASHINGTON,

V.

UNITED STATES OF AMERICA,
H. LAWRENCE GARRETT,

JUDGMENT IN A CIVIL CASE

CASE NO: 91-1246G (BTM)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the motion by defendant H. LAWRENCE GARRETT to dismiss was granted on 5/20/92 and that the motion by defendant UNITED STATES OF AMERICA to dismiss is granted.

/s/ S. AUGUST
By Deputy Clerk

ENTERED ON 10/28/92

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE WASHINGTON,	)	Feb. 7, 1994
	)	
Plaintiff-Appellant,	)	No. 92-56330
	)	
v.	)	D.C. No. CV-91-
	)	1246-G (BTM)
	)	
UNITED STATES OF AMERICA; H. LAWRENCE GARRETT III,	)	
	)	ORDER
Defendants-Appellees	)	

Before: TANG, FLETCHER and POOLE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED IN U.S. COURT OF
APPEALS FEBRUARY 7, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DIANE WASHINGTON,	)	
	)	Civil No. 91-
	)	-1246-G (BTM)
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
THE UNITED STATES OF AMERICA, H. LAWRENCE GARRETT, III, Secretary of the Navy,	)	
	)	
Defendants.	)	

On April 13, 1992, this court heard defendant's motion to dismiss. After review of the papers submitted and oral arguments, this court denies the motion as to the United States but grants as to H. Lawrence Garrett III, Secretary of the Navy.

This court finds that plaintiff may have a viable claim under the Federal Tort Claims Act. California law recognizes that a defendant has a duty to control a

third party's conduct if "the defendant stands in some special relationship to ..." Tarasoff v. Regents of University of California, 17 C.3d 425, 435 (1976).

In this case, plaintiff alleges that the third party was an enlistee in the U.S. Navy.[1] Moreover, the Navy purportedly had a policy of issuing "safe sex" orders to people who have tested positive for the HIV virus. However, plaintiff avers that after the Navy tested the third party and found him positive for the virus, the Navy failed to issue the "safe sex" order to him. Thus, based on California law, plaintiff's allegations are cognizable under the Federal Tort Claims Act.

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[1] Under the Federal Tort Claims Act, the United States is the defendant in lieu of the U.S. Navy. See generally, 28 U.S.C. Section 1346(b) and Section 2679.

The court finds that plaintiff's complaint lacks factual allegations regarding defendant Garrett. Garrett is mentioned only in the caption of the complaint. The caption identified him as Secretary of the Navy, implying that he acted within the scope of his employment when plaintiff was allegedly injured. The Federal Tort Claims Act authorizes an action to be brought only against the United States and precludes suit against any other party including a federal employee such as Garrett. 28 U.S.C. Section 2679(b)(1). Hence, defendant Garrett is dismissed as a defendant.

IT IS SO ORDERED.

Dated: May _____, 1992.

/s/ EARL B. GILLIAM, JUDGE
UNITED STATES DISTRICT
COURT FILED IN U.S.
DISTRICT COURT ON MAY 20, 1992

ENTERED IN U.S. DISTRICT
COURT ON MAY 21, 1992

NAVY JAG DIRECTIVES CONTROL

DEPARTMENT OF THE NAVY

Office of the Secretary

Washington, D.C. 20350-1000

SECNAVINST 5300.30B

OP-136C

15 December 1988

From: Secretary of the Navy

To: All Ships and Stations

Subj: MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) INFECTION IN THE NAVY AND MARINE CORPS

Ref: (a) SECDEF memo of 4 Aug 1988 (NOTAL)

(b) ASD (HA) memo of 11 SEP 1987 (NOTAL)

(c) SECNAVINST 1850 4B (NOTAL)

(d) SECNAVINST 1910.4A (NOTAL)

(e) SECNAVINST 1920.6A

(f) SECNAVINST 5211.5C

1. Purpose. To revise the policy on identification, surveillance and administration of military members, applicants, and health care beneficiaries infected with Human Immunodeficiency Virus (HIV), in compliance with references (a) through (f).

2. Cancellation. SECNAVINST 5300.30A

3. Policy. Department of the Navy medical, manpower and personnel policies related to HIV are intended to reflect current knowledge of the natural history of HIV infection, the risks to the infected individual incident to military service, the risk of transmission of the disease to noninfected personnel, the effect of infected personnel on naval

units, and the safety of military blood supplies. To this end the following policies are established:

a. Applicants who are HIV antibody positive are not eligible for entry into the naval service. Accessions, for active duty or reserve programs,k in initial military training who are determined to be HIV antibody positive as a result of serologic testing are not eligible for military services and will be separated.

b. Military personnel (active and reserve) shall be tested for the presence of HIV antibodies to maintain the health of the force and to develop scientifically based information on the natural history and transmission of HIV, Acquired Immune Deficiency Syndrome (AIDS), and AIDS-Related Complex (ARC). Family members of active duty personnel and DOD civilian employees entitled to military medical

care, on a voluntary basis, shall be tested as resources permit. Mandatory testing of civilians for serologic evidence of HIV infection is not authorized except pursuant to valid requirements by a host country.

c. A surveillance program will be conducted for active duty and reserve component members, other than accessions in initial military training, to determine if HIV infection exists.

(1) Active duty members who are HIV antibody positive but who demonstrate no evidence of immunologic deficiency, neurologic involvement, decreased capacity to respond to infection, or clinical indication of disease associated with HIV antibody positivity shall be retained in the naval service.

(2) HIV antibody positive members retained on active duty shall be assigned within the United States.

(3) Immunologic deficiency, neurologic involvement, decreased capacity to respond to infection, or progressive clinical or laboratory abnormalities associated with HIV, are unfitting conditions. Active duty members who are HIV antibody positive and demonstrate immunologic deficiency, neurologic involvement, decreased capacity to respond to infection, or progressive clinical or laboratory abnormalities associated with HIV shall be processed through the Disability Evaluation System (DES) under reference (c). Additionally, personnel diagnosed following the guidelines of reference (b), as having ARC and AIDS shall be processed through the DES.

d. Members of the Reserve components (Reservists not on extended active duty of more than 30 days) who are HIV antibody positive and who can be assigned to mobilization billets in the United States which do not require immediate deployment and do not require availability for reassignment overseas or to deployable billets shall be retained in the Ready Reserve. All HIV antibody, positive Reservists for whom such mobilization billet assignments cannot be made shall be transferred involuntarily to the Standby Reserve Inactive.

e. HIV antibody positive reserve component members not on extended active duty are ineligible for medical evaluation in military treatment facilities.

f. To facilitate development of scientifically based information on the natural history and transmission patterns

of HIV, it is important that HIV antibody positive members assist the military health care system by providing accurate information. Accordingly, simply the occurrence of HIV antibody positivity, infection, or HIV-related disease shall not be used as the basis for any adverse action against an individual.

g. Informational programs will be conducted to reduce apprehensions about the risks of HIV infection and to inform service members about the prevention and risks of HIV infection.

4. Accession Policy

a. Both prior service and non prior service applicants for active or reserve service will be screened for exposure to HIV prior to entrance on active duty or affiliation in the Navy or Marine Corps Reserve. Individuals confirmed HIV

antibody positive are not eligible for naval service because:

(1) The condition existed prior to appointment or enlistment.

(2) Such individuals may suffer potentially life threatening reactions to some live-virus immunizations at basic training.

(3) HIV antibody positive individuals are not able to participate in battlefield blood on donor activities or other military blood donation programs.

(4) There presently is no way to differentiate those who will progress to clinical disease from those who will remain healthy.

(5) The Department of the Navy will avoid medical costs and the possibility that the individual will not complete the initial service commitment.

b. Applicants for active and reserve enlisted service normally will be tested at Military Entrance Processing Stations (MEPS). Applicants not tested at the MEPS will be tested as part of their physical examination conducted prior to accession. If more than twelve months have elapsed between the pre-accession test and entry on active duty, a retest must be conducted. These new accessions who are confirmed HIV antibody positive are not eligible for military service and will be processed for separation by reason of erroneous enlistment at the accession point under reference (d). Prior service applicants for entry into a Reserve program must have a HIV test within twelve months of entry.

c. Individuals who are participating in, or applying for, any commissioned or warrant officer

procurement program who are HIV antibody positive are not eligible for the program or for appointment as officers. Candidates for service as officers (either regular or reserve), shall be tested during the pre-contract physical examination required for acceptance in the particular program applied for, and during the pre-appointment physical examination required prior to appointment or superseding appointment. Enlisted personnel also must be tested within twelve months prior to acceptance into the officer training program for which applying. Applicants who are ineligible for appointment due to HIV antibody positivity shall be processed as follows:

(1) Individuals in Officer Candidate School/Officer Indoctrination School/Aviation Officer Candidate School/Platoon Leaders Class/Naval

Aviation Cadet School/Aviation Reserve Officer Candidate School (OCS/OIS/AOCS/PLC/ NAVCAD/AVROC) as their initial entry training, shall be separated, discharged, or disenrolled as appropriate. Enlisted service members who are candidates in these programs shall be immediately disenrolled from the program. A candidate who was on extended active duty prior to entry into candidate status and who is HIV antibody positive shall be retained in enlisted status unless the individual requests discharge or is separated for disability under reference (c). In either case, if the sole basis for discharge is HIV positivity, an honorable or entry level separation, as appropriate, shall be issued.

(2) Individuals in Naval Reserve Office Training Corps (NROTC)

shall be disenrolled from the program at the end of the academic term (i.e.: semester, quarter, or similar period) in which evidence of HIV infection is detected. Disenrolled NROTC participants shall be permitted to retain any financial support through the end of the academic term in which the disenrollment is effected. Financial assistance received in these programs is not subject to recoupment if the sole basis for disenrollment is HIV positivity.

(3) Naval Academy midshipmen shall be separated from the Naval Academy and discharged when confirmed HIV positive. The Secretary of the Navy may delay separation to the end of the current academic year.1 A midshipman granted such a delay in the final academic year, who is otherwise qualified, may be graduated without commission and thereafter

discharged. If the sole basis for discharge is HIV positivity, an Honorable discharge shall be issued.

(4) Commissioned officers in professional education programs leading to appointment in a military professional specialty (including but not limited to medical, dental, chaplain, and legal/judge advocate) shall be disenrolled from the program at the end of the academic term in which HIV positivity is identified. Regular officers and Reserve officers on active duty or who entered the program from active duty shall be retained in a designator or MOS determined by the Chief of Naval Operations (CNO) or the Commandant of the Marine Corps (CMC), as appropriate on a case-by-case basis. Reserve officers on inactive duty who were commissioned for the purpose of participation in such programs shall be

discharged. Except as specifically prohibited by statute, any additional service obligation incurred by participation in such programs shall be waived and financial assistance received in these programs shall not be subject to recoupment. Periods spent in these programs shall be applied fully toward satisfaction of any pre-existing service obligation.

d. Accessions who are confirmed positive for HIV antibody will not be sent for medical evaluation. They will be informed of the test results; will be counseled on the relationship between the blood tests, HIV virus, and AIDS, and will be provided medical, psychological and spiritual support while awaiting separation.

5. HIV Testing Procedure

a. Testing of naval personnel for the antibodies associated with HIV will include a screening test (Food and Drug Administration approved enzyme immunoassay (EIA)), a confirmation test (immunoelectrophoresis (Western Blot) and, if necessary, Department of Defense approved supplemental tests, as they become available. All personnel with either serologic evidence of HIV infection or a positive virus isolation shall be classified under the standardized clinical protocol defined in reference (b).

b. Delays in obtaining results of confirmation tests shall be minimized to prevent uncertainty and apprehension of members awaiting the outcome. Military personnel not in a confined status shall not be segregated based on screening or confirmation tests.

6. Active Duty Testing

a. Active duty personnel serving in overseas and deployable units and all active duty health care providers shall be tested on an annual basis during each calendar year. All other personnel shall be tested in conjunction with routinely scheduled medical examination if not tested within the preceding 12 months.

b. Active duty members issued Permanent Change of Station (PCS) orders to a continental United States deployable command are required to have an HIV test within twelve months prior to transfer and results documented if received prior to transfer. If results are received after the member has transferred to the command, they shall be forwarded to the new duty station for insertion in medical/dental records.

c. Personnel issued PCS orders to an overseas duty station are required to

have a negative HIV test completed and results documented in health and dental records within twelve months prior to transfer.

d. Active duty health care providers may be screened more often when prescribed by the Surgeon General.

e. Due to increased risk of exposure to HIV, all military personnel identified with a Sexually Transmitted Disease (STD) will be retested on each episode or recurrence. Additionally, all military personnel counseled or treated for alcohol or drug abuse or presenting at prenatal clinics will be tested. Voluntary testing will be provided to dependent beneficiaries presenting for treatment or evaluation of STD, alcohol, drug, or prenatal care.

f. All HIV antibody test results must be documented in the medical/dental

records under current Naval Medical Command guidelines. Commanding officers will assure all screening results are provided to appropriate medical and dental record holders.

7. Reserve Component Testing

a. Reserve personnel in the following categories shall be retested on an annual basis unless testing is required more frequently, as resources permit. Reserve health care providers may be screened more often when prescribed by the Surgeon General.

(1) Reserve personnel receiving orders to active duty for 30 days or more.

(2) Selected Reserve personnel subject to deployment on short notice to areas of the world with a high risk of endemic disease or with minimal existing medical capability.

(3) Selected Reserve personnel serving in units subject to deployment overseas.

(4) Selected Reserve health care providers as appropriate.

b. Testing will occur during each routine physical examination including those required annually/tri-annually/quadrennially, as well as, those examinations conducted for the purpose of reenlistment if a test has not been performed within the last twelve months.

8. Evaluation of HIV Positive Personnel

a. Active duty military members and, on a voluntary basis, dependents who test positive for exposure to HIV virus will be medically evaluated to determine the medical status of their infection. The standardized Department of Defense clinical protocol in reference (b) will be used. The medical evaluation for active

duty members shall be documented by a Medical Board.

b. Reserve component members who are found HIV positive shall be counseled regarding the significance of a positive HIV antibody test by an officer designated for the purpose and referred to their private physician for medical care and counseling. Reserve component members not on extended active duty are ineligible for medical evaluation in military treatment facilities.

9. Active Duty Assignment and Retention

a. Military personnel who demonstrate no evidence of immunologic deficiency neurologic involvement, decreased capacity to respond to infection, or clinical indication of disease associated with HIV infection shall be retained in the service, unless some other reason for separation exists.

This policy is based on the following considerations:

(1) There is no demonstrated risk of transmission of disease in normal daily activities.

(2) An investment in training of these members has been made.

(3) The condition may be incident to service.

b. HIV positivity shall not be used to deny reenlistment to members on continuous active duty.

c. Military personnel who are HIV antibody positive and retained under this policy shall be assigned within the United States to a unit not normally programmed for deployment within 300 miles of a Naval Medical Treatment Facility (MTF) designated by the Surgeon General.

d. The CNO and the CMC may establish further limitations on

assignment of such members to operational units or specific duties when deemed necessary to protect the health and safety of HIV antibody positive members and of other military personnel. The Secretary of the Navy shall be advised 30 days in advance of each type of limitation in assignment or duties and the specific reasons therefore.

10. Active Duty Separation

a. Military personnel who are HIV antibody positive who demonstrate unfitting conditions of immunologic deficiency, neurologic involvement, decreased capacity to respond to infection, or clinical indication of disease associated with HIV infection will be processed through the Disability Retirement System under chapter 61 of title 10 of the United States Code, as implemented by reference (c).

b. Military personnel retained on duty under this policy, but who are found not to have complied with the directives given during lawfully ordered preventive medicine procedures are subject to appropriate administrative and disciplinary actions including separation for cause under references (d) and (e).

c. A member who is HIV positive and retained on active duty may request voluntary separation under the following guidelines:

(1) Members may apply for separation because of HIV positivity within 90 days after initial medical evaluation and classification is completed. The 90 day period begins the day the medical board report of HIV positivity is signed by the member. Personnel requesting separation after the 90 day period has expired will be

considered on a case-by-case basis. Separation may be delayed up to 180 days after initial evaluation in order to minimize manning shortfalls and to provide for continuity of functions. Members who volunteer for separation will be processed for convenience of the government, due to compelling personal need. The discharge shall be characterized as warranted by service record following the guidelines in references (d) and (e). Members who elect separation will not be allowed re-entry into the service at any future date.

(2) The CNO or CMC will normally deny the request when the member:

(a) Is serving in a competitive category, designator, rating, Navy enlisted code, occupational field, or military occupational specialty in which the CNO or the CMC determines that

significant personnel shortage justifies retention.

(b) Has not completed obligated service incurred for funded education programs, enlisted education and/or training including Enlisted Education Advancement Program, advanced educational or technical training, initial and advanced skill training which require obligation beyond current service obligation, nuclear power field, advanced electronic field, and advanced technical field programs, and similar programs.

(c) Was notified of HIV positive status prior to executing orders or entering a program requiring obligated service.

(3) Due to the substantial investment in training of naval personnel, commands initially processing individuals requesting voluntary separation will

ensure they have considered the cost to the naval service of voluntary separation. Additionally, the command will counsel the individual on the potential for lost benefits resulting from a voluntary separation. The individuals request for separation must document lack of implied pressure or coercion.

(4) Notwithstanding the limitation in paragraph 10c(2), a request for separation may be approved when in the judgment of the Secretary, with the advice of the CNO or the CMCD, on a case-by-case basis, the applicant has demonstrated overriding and compelling factors of personal need which justify separation for HIV positivity.

(5) Members voluntarily separated from the active force by reason of HIV positivity who have a remaining military obligation, will be transferred

to the Standby Reserve Inactive unless there are other medical reasons why the member would not be available to meet mobilization requirements.

d. Separation for cause or for other reasons under references (d) and (e), based upon evidence other than HIV positivity, is unaffected by this instruction, subject to the limitation in paragraph 15.

11. Reserve Component Policy

a. Assignment. Reserve members applying for extended active duty for a period over 30 days or active duty for training over 30 days in any capacity must have a current negative HIV test within twelve months of execution of orders documented in health and dental records. In circumstances where a current HIV test is not available and cannot be obtained prior to the required active duty, the

reserve member may be ordered to active duty and the HIV test performed on blood drawn within the first 10 days. If that test is positive, the active duty will be terminated and the member will revert to inactive status. In addition, Reserve personnel performing official duty outside the United States for any period must have a negative HIV test documented in health and dental records within twelve months prior to departure date.

(1) Reserve component members testing positive for the HIV antibody are ineligible for active duty over 30 days except under conditions of mobilization.

(2) Members of the Reserve components (Reservists not on extended active duty of more than 30 days) who are HIV antibody positive and who can be assigned to mobilization billets in the United States which do not require

immediate deployment and do not require availability for reassignment overseas or to deployable billets shall be retained in the Ready Reserve. All HIV antibody positive Reservists for whom such mobilization billet assignments cannot be made shall be transferred involuntarily to the Standby Reserve Inactive.

b. Retention and Separation. HIV antibody positive reservists who desire to continue affiliation with the Ready Reserve and for whom a billet is available for duty in the United States as described in 11a(2) above must obtain from his/her civilian physician an evaluation conforming to the protocol prescribed by the Department of Defense for HIV evaluation. Reserve personnel presenting documented evidence from their civilian physician showing no evidence of immunologic deficiency, neurologic

involvement, decreased capacity to respond to infections, or clinical indication of disease associated with HIV antibody positivity as determined by military health care providers may be retained in the Ready Reserve. If evaluation results are not provided within two months of notification of being HIV positive, the HIV antibody positive reservist shall be transferred to the Standby Reserve Inactive or processed for separation depending on the needs of the naval service.

c. HIV positivity shall not be used to deny continuous reenlistment of reservists in an active status. Continuous reenlistment will not be denied or delayed awaiting test results.

d. Reserve component members may apply for separation by reason of HIV positivity within 90 days of their initial

formal counseling by representatives of the Naval service. The 90 day period begins the day the Reservist is formally counseled per current service regulations. Reserve component members requesting separation after the 90 day period has expired will be considered on a case-by-case basis. Members who elect separation will not be allowed to re-enter into the service at any future date. The CNO or CMC may approve such requests based on manpower requirements and the needs of the service.

(1) The CNO and CMC will deny this request if the Reserve Component member has any remaining statutory service obligation.

(2) Any request for separation must document the lack of implied pressure or coercion leading to such request by the command involved.

12. Medical and Epidemiological Factors

a. On-going Clinical Evaluation. An on-going clinical evaluation will be conducted at least annually of the health status of each active duty HIV antibody positive military member using the DOD protocol established in reference (b).

b. Epidemiological Assessment. The initial and on-going medical evaluations of each HIV positive individual will include an epidemiological assessment of the potential for transmission of HIV to close personal contacts and family members. This information is vital to appropriate preventive medicine counseling and to continued development of scientifically based information regarding the natural history and transmission pattern of HIV.

(1) Upon notification that an individual is HIV positive, the cognizant

military health authority shall undertake preventive medical action including counseling of the individual and others at risk of infection such as his or her sexual contacts (who are military health care beneficiaries). Such preventive action and counseling will include information on transmission of the virus, coordination with military and civilian blood bank organizations to trace possible exposure through blood transfusion or donation of infected blood, and referral of appropriate case-contact information to the cognizant military or civilian health authority. Under the confidentiality and disclosure guidance in paragraph 14, any information linking the individual to HIV antibody positivity, is not to be released to civilian agencies or to military activities without a demonstrated need to know.

(a) HIV positive individuals who are military health care beneficiaries shall be counseled by a physician or designated health care provider regarding the significance of a positive antibody test. They shall be advised as to the mode of transmission of this virus, the appropriate precautions and personal hygiene measures required to minimize transmission through sexual activities and/or intimate contact with blood or blood products, and of the need to advise any past sexual partners of their infection and directed to follow these preventive medicine procedures. Women shall be advised of the risk of perinatal transmission during past, current, and future pregnancies. The beneficiary shall be informed that he or she is ineligible to donate blood, organs, sperm, or any other body part.

(b) The assessment shall attempt to determine previous contacts of the HIV positive individual. The individual shall be informed of the importance of case-contact notification to interrupt disease transmission and shall be informed that contacts will be advised of their potential exposure to HIV. Individuals at risk of infection include sexual contacts (male and female), children born to infected mothers, recipients of blood or blood products, organs, tissues, or sperm, and users of contaminated intravenous drug paraphernalia. Those individuals determined to be at risk who are identified and who are eligible for health care in the military medical system shall be notified. Active duty military members identified to be at risk shall be counseled and tested for HIV infection.

Other beneficiaries, such as retirees and family members, identified to be at a risk shall be informed of their risk and offered serologic testing, clinical evaluation, and counseling. If a Reserve component member is found to be HIV infected, his or her spouse shall be notified, either through local public health authorities or by DOD health care professionals following procedures developed by the Surgeon General in coordination with the Director of the Naval Reserve and the CMC. Reserve spouse notification will not be conducted until these procedures are promulgated by separate correspondence. The names of individuals identified to be at risk who are not eligible for military health care shall be provided to local civilian health authorities unless prohibited by the appropriate state or host nation civilian

health authority. Anonymity of antibody positive individuals shall be maintained unless reporting is required under paragraph 12c.

c. Data Base of HIV Exposure. The Commander, Naval Medical Command will establish and maintain a central data base of Department of the Navy military personnel exposed to HIV to support on-going clinical evaluation and longitudinal epidemiologic evaluation. Based on the guidance in paragraph 15 including data required by reference (b), data base information and information derived therefrom, including any information linking individuals to HIV antibody positivity, but excluding statistical data not linked to identifiable individuals, is not to be released to civilian agencies or to military activities without a demonstrated need to know. Within these

limitations, information may be disclosed only as follows:

(1) To medical and command personnel to the extent necessary to perform their required duties.

(2) To civilian health authorities but only in response to a valid request. All such requests will be referred to Commander, Naval Medical Command. He will determine whether the civilian requirements to report HIV positivity is a valid formal request for such reporting from a civilian health authority.

(3) To activities outside DOD upon request, limited to aggregated testing data. All requests for such data will be referred to the CNO or CMC as appropriate.

(4) To authorized personnel for the purpose of conducting scientific

research, epidemiological assessment, management audits, financial audits or program evaluation. Personnel receiving information from the data base shall not identify, directly or indirectly, any individual service member in any report of such research, assessment, audit or evaluation, or otherwise disclose service member identities in any manner.

(5) In response to an order of the judge of a court of competent jurisdiction.

(6) The Director, Naval Medicine, under the CNO, will provide a quarterly report of HIV testing results, for the active forces and the Reserve components, including trend analysis and evaluations of the reported information, to the CNO, CMC, and Assistant Secretary of the Navy (Manpower & Reserve Affairs)

(ASN(M&RA)) within 30 days of the end of each fiscal quarter.

d. Safety of the Blood Supply

(1) Armed Services Blood Program Office policies, Food and Drug Administration guidelines, and accredition requirements of the American Association of Blood Banks will be followed in the Department of the Navy Blood program and by civilian blood agencies collecting blood on naval installations. In the event that units of blood shall not be screened for infectious agents prior to transfusing (contingency of battlefield situations), the Armed Services Blood Program office in coordination with the military departments and unified or specified commands, shall provide guidance to operational units

(2) Individuals found to be HIV antibody positive will be designated

ineligible to donate blood or to be used as source of emergency transfusions. Military personnel found to HIV antibody positive shall be designated as blood donor ineligible in their health records.

13. Information Programs. The chief of Information (CHINFO) will conduct on-going Department of the Navy-wide information programs covering HIV infection using Department of Defense recommended HIV/AIDS information materials and other information media under his control or oversight. This program will keep military personnel informed and reduce uninformed speculation about the incidence and risks of infection in military service. In conjunction with this overall program, the Navy Surgeon General will provide public health information materials to the beneficiary population

served by Department of the Navy medical and dental facilities.

14. Confidentiality and Disclosure. Information on the sources of HIV exposure and the progress of the disease is limited. There is much misinformation and unwarranted apprehension about who is or who can be a source of infection. Allegations and suspicions based on the current tests, which identify only the presence of HIV antibodies, can be disruptive to unit morale and unjustly harm professional standing and acceptance in military units. There are potential problems associated with disclosing a person's HIV positivity, such as discrimination in employment, health and life insurance, school attendance, etc. For these reasons:

a. HIV test results must be treated with the highest degree of confidentiality

and released to no one without a demonstrated need to know. Strict compliance with the provisions of the Privacy Act instructions in reference (f), is required.

b. All command and medical personnel with access to such information must ensure careful, limited distribution within the specific guidelines of paragraphs 12c, 15, and reference (f) to affirmatively combat unfounded innuendo and speculation about the meaning of the information.

15. Limitation on the Use of Information

a. Information obtained from a service member during or as a result of an epidemiologic assessment interview may not be used against the service member in a court martial; nonjudicial punishment;p involuntary separation (other than for medical reasons); administrative or

disciplinary reduction in grade; denial of promotion; an unfavorable entry in a personnel record; a bar to reenlistment; and any other action considered by the Secretary of the Navy to be an adverse personnel action. The term epidemiologic-assessment interview means: that part of the medical assessment of a HIV positive individual where the questioning of the member is for the direct purpose of obtaining epidemiologic or statistical information regarding the occurrence, source, and potential spread of the infection. The epidemiologic-assessment interview will be conducted by the interviewing health care professional during the medical evaluation used to determine the possible mode of transmission and the status of potential infection.

b. Results of laboratory tests for HIV positivity may not be used against a service member as the sole basis of az charge in any disciplinary proceeding. However, such test results may be used as evidence at any stage in a disciplinary proceeding. Such test results may not be used to support, in whole or in part, the characterization of a discharge in administrative separation proceedings; or in a line of duty/misconduct determination in disability separation proceedings, except as specifically authorized by this instruction.

c. The limitations in paragraph 15a pertaining to the use of information obtained from a member by a health care professional during the epidemiologic-assessment interview does not apply to: the introduction of evidence for impeachment or rebuttal purposes in any

proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) has been first introduced by the service member or to disciplinary or other action based on independently derived evidence; or, nonadverse personnel actions such as reassignment, disqualification (temporary or permanent) from a personnel reliability program, denial, suspension, or revocation of a security clearance, suspension or termination of access to classified information, and, duties requiring a high degree of stability or alertness such as flight status, explosive ordnance disposal, or deep-sea diving.

d. If any personnel actions are taken because of or are supported by serologic evidence of HIV infection or information described in paragraph 13a, care shall be taken to ensure that no unfavorable entry is placed in a personnel

record in connection with the action. Recording a personnel action, including recording a disciplinary action, is not itself an unfavorable entry in a personnel record. Additionally, information that reflects that an individual has serologic or other evidence of HIV infection is not an unfavorable entry in a personnel record.

e. The CNO and the CMC may propose, with supporting justification, actions that should be considered to be adverse as defined in paragraph 15a.

16. The policies in this instruction will be reviewed following the next review of the policy guidance of reference (a) or as required by the Secretary of the Navy. This review will assess developments in medical management of HIV infections, information obtained through longitudinal epidemiologic studies of the natural

history of HIV infections and of the effects on manpower and personnel management of these policies.

17. Responsibility

a. ASN(M&RA) is responsible for overall HIV policy and execution. The CNO and CMC are responsible for carrying out the policies in this instruction. The CNO will ensure that medical assistance and laboratory testing is maintained to support the prescribed testing program consistent with maintaining quality control to assure the minimum achievable false positive and false negative confirmation rates, to meet the full testing requirements of the Navy and Marine Corps and their respective reserve components.

b. The Director, Naval Medicine, under the CNO, is responsible for the policy development of professional medical

and epidemiological aspects of the HIV management program. he will participate in tri-service development of a standardized clinical protocol for medical evaluation of infection. He shall keep ASN(M&RA), CNO, and CMC advised of Department of the Navy and DOD epidemiological information and trends.

c. Chief of Information (CHINFO) shall conduct Department of the Navy-wide information programs using all information media under his control or oversight.

d. The Commander, Naval Medical Command, will establish and maintain a Department of the Navy data base for statistical purposes and detailed analysis as needed. He is also responsible for entering all HIV test results (positive and negative) into the Reportable Disease Data Base System (RDDBS).

18. Reports. The reporting requirements contained in this directive are exempt from reports control by OPNAVINST 5214.7.

H. LAWRENCE GARRETT, III
Acting, Secretary of the Navy

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SENSITIVE - FOR OFFICIAL USE ONLY

COMMAND ORDERS TRANSMITTAL FOR HIV POSITIVE PERSONNEL

I am issuing the following advisory to:

/s/ JO1 DIANE Y. WASHINGTON, USNR-R
042-48-8608

1. Prior to engaging in sexual activity, or any activity in which your bodily fluids may be transmitted to another person, you should verbally advise any prospective sexual partner of your HIV positivity and the risk of possible infection.

2. If your partner consents to sexual relations, you should not engage in sexual activities without the use of a condom.

3. You should advise your potential sexual partner that the use of a condom does not guarantee that the virus will not be transmitted.

4. You will not donate blood, sperm, body tissues, organs, or other body fluids (e.g., breastmilk), as appropriate.

5. You will not share personal implements, including but not limited to, toothbrushes and razors with other individuals. This provision does not preclude visits to license barbers or beauticians.

6. You must provide advance notification of your HIV positivity to all health care workers who will be providing medical care to you.

IMPORTANT: Your failure to comply with these orders may subject you to disciplinary action under the UCMJ and/or administrative separation.

I acknowledge understanding of the above advisory.

/s/ DIANE Y. WASHINGTON 7/19/89

Orders transmitted, and member's signature witnessed by:

/s/ CAPT. W.F. THRELKELD, 253-70-3727

Certified to be a true copy.

W.F. THRELKELD
CAPT USNR
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No. 94-22

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIANE WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the *Feres* doctrine bars a naval reservist's suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, alleging that she contracted the HIV virus because the Navy, which was aware that the naval petty officer from whom she acquired the virus was infected, had negligently failed to order him to inform potential sex partners of his HIV-positive status.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18), is unpublished, but the decision is noted at 12 F.3d 1111 (Table). The opinion of the district court (Pet. App. A19-A20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1993. A petition for rehearing was denied on February 7, 1994. Pet. App. A41-A42. The petition for a writ of certiorari was filed on May 9, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a naval reservist, tested positive for the HIV virus after she had sexual relations with a naval petty officer. Petitioner filed suit against the United States, alleging that the Navy had negligently failed to order the petty officer to inform potential sex partners of his HIV-positive status. The district court ruled that petitioner was precluded from relitigating her claim because the district court had ruled in an earlier case that her claim is barred by *Feres* v. *United States*, 340 U.S. 135 (1950), and dismissed the suit. Pet. App. A19-A20; A36-A37. The court of appeals affirmed. *Id.* at A1-A18.

1. Petitioner is a member of the United States Naval Reserve who worked part-time for the Navy as a journalist. She met petty officer John Joseph in December, 1988, when they worked in the same naval office. On January 22, 1989, petitioner and Joseph engaged in sexual intercourse at Joseph's off-base apartment. This was the only time petitioner had intercourse with Joseph. Pet. App. A2-A3.

Petitioner learned in July, 1989, that she had tested positive for the HIV virus during her annual screening by the Navy. She had not had intercourse with anyone besides Joseph since her last test, which had been negative. Petitioner was ordered by the Naval reserves to disclose her HIV-positive status to all potential sex partners. Pet. App. A3.

Joseph had tested positive for the HIV virus in a Navy test approximately a year before he met petitioner. Joseph received medical evaluations and counseling regarding his HIV-positive status, but he was not ordered by the Navy to disclose his HIV-positive status to potential sex partners. Joseph thus knew of his HIV-

positive status at the time he had intercourse with petitioner, but he withheld the information. Petitioner alleges that she would not have had intercourse with Joseph if she had known of his HIV-positive status. Pet. App. A3-A4.

The Navy's investigation also revealed that in November, 1988, Joseph's wife had reported to his commanding officer that Joseph was "pursuing sexual liaisons with other women without telling them he was carrying the AIDS virus." Pet. App. A5. The commanding officer spoke to Joseph about the allegation, but Joseph denied wrongdoing and the commanding officer did not pursue the matter further. *Ibid.*

As a result of the investigation requested by petitioner, Joseph was court-martialed. Joseph was convicted of aggravated assault for infecting petitioner with the HIV virus. *United States* v. *Joseph*, 33 M.J. 960 (N.-M.C.M.R. 1991), aff'd, 37 M.J. 392 (1993). Pet. App. A5. Petitioner filed an unsuccessful administrative claim with the Navy to recover for the injuries Joseph caused her. Pet. 15.

2. Petitioner filed suit in the United States District Court for the Southern District of California under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging that she contracted the HIV virus as a result of the Navy's negligent failure to order Joseph to inform potential sex partners of his HIV-positive status. Pet. App. A6. The district court dismissed petitioner's suit under the *Feres* doctrine, as developed in *United States* v. *Shearer*, 473 U.S. 52 (1985), because the suit would have required the court to second-guess military command. See *Washington* v. *United States*, No. 91-0301 GT(IEG) (S.D. Cal. July 10, 1991), attached as App., *infra*, 1a-3a; see also Pet. App. A6. The court also ruled that, even if the *Feres* doctrine did not apply, petitioner

would have no cause of action under the FTCA because petitioner had not established that the United States had any duty under California law to restrain the sexual behavior of its employees. App., *infra*, 2a-3a.

Petitioner did not appeal that ruling, but instead filed *pro se* a "virtually identical" second complaint. Pet. App. A6. She added the Secretary of the Navy as a defendant and added new allegations concerning the non-service connected nature of her injury and the Navy's safe sex policy. *Id.* at A6-A7.

The government filed a motion to dismiss. The district court granted the motion with respect to the Secretary of the Navy. The court initially refused to dismiss the suit with regard to the United States, stating that petitioner might have a valid claim against the government under the FTCA. Pet. App. A7-A8. After petitioner retained counsel, however, the district court granted the government's second motion to dismiss, explaining that, although it had "wanted to make sure that [petitioner] had every opportunity to get her allegations before the court," the dismissal of the first suit on *Feres* grounds constituted "the law of the case." Pet. App. A8-A9, A36-A37.

3. The court of appeals affirmed. Pet. App. A1-A18. The court of appeals noted that the Navy urged affirmance because petitioner was bound, under principles of estoppel, by the district court's ruling in her first case that her claim was barred under *Feres*, and because petitioner did not, in any event, have a meritorious claim under the FTCA. *Id.* at A11 & n.6; see Gov't C.A. Br. 11-16; 21-43. The court of appeals declined to address these issues. Pet. App. A17-A18.

On the merits of the *Feres* question the court found that the negligence alleged by petitioner, *i.e.*, the failure to issue an appropriate military order to Joseph, impli-

cates the need to protect the military disciplinary structure from judicial second-guessing, which is one of the rationales underlying the *Feres* doctrine. Pet. App. A13. The court held that petitioner's claim was barred by the *Feres* doctrine as elaborated in *United States* v. *Shearer*, 473 U.S. 52 (1985).

ARGUMENT

1. Petitioner seeks review of three questions concerning the applicability of *Feres* v. *United States*, 340 U.S. 135 (1950), to her case. Pet. i-ii. The doctrine of issue preclusion or collateral estoppel, however, bars petitioner from relitigating the *Feres* issue. In her earlier lawsuit, the district court decided that *Feres* barred petitioner's claim. App., *infra*, 1a-2a. If petitioner wanted to challenge that ruling, the proper avenue for relief was for her to have sought appellate review at that time. Petitioner did not appeal; thus, the district court's first ~~first~~ ruling, in a case in which the *Feres* issue was litigated and determined, is conclusive in petitioner's second suit, which presented a "virtually identical" claim. Pet. App. A6-A7. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982); *Peck* v. *Commissioner*, 904 F.2d 525, 527 (9th Cir. 1990), quoting *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980); *Deutsch* v. *Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987).[1] The *Feres* issue that petitioner seeks to raise can have no bearing on the

[1] The district court also ruled in the first suit that, as a matter of law, petitioner had "no cause of action under the Federal Tort Claims Act" under applicable California law. App., *infra*, 2a. That ruling would preclude petitioner from relitigating her FTCA claim against respondent even if *Feres* did not apply.

outcome of the case and therefore is not properly presented for review.[2]

2. Petitioner's contention that *Feres* should not apply because this case involves public health issues is incorrect. The *Feres* decision, which addressed three consolidated cases, held that military service members may not sue the government under the FTCA for medical malpractice, see 340 U.S. at 137, and the courts of appeals have frequently applied *Feres* to bar FTCA claims alleging negligent provision of health-related services to service members. See, *e.g.*, *Persons* v. *United States*, 925 F.2d 292 (9th Cir. 1991); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Sidley* v. *United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988).

Petitioner also asserts (Pet. 40) that "[t]he fact that she had or has some connection to the military because of being in the reserves is irrelevant" and contends that she should be permitted to sue as if she were not a member of the military. The *Feres* doctrine is not applied to bar suits by persons who are not members of the military. See, *e.g.*, *United States* v. *Brown*, 348 U.S. 110 (1954). *Feres* may apply, however, to suits brought by reservists or members of other military services who are not on full-time active duty, where the alleged injuries "arise out of or are in the course of activity incident to service." 340 U.S. at 146; see, *e.g.*, *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977)

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[2] Collateral estoppel was raised by the United States as a defense in both the district court and the court of appeals. See Pet. App. A7-A9, A11 & n.6, A17-A18. The district court expressly noted that the ruling in petitioner's first lawsuit that the *Feres* doctrine barred petitioner's claim had not been appealed and therefore constituted "the law of the case". Pet. App. A6-A9; *id.* at A37.

(National Guard member); *Anderson* v. *United States*, 724 F.2d 608, 610 (8th Cir. 1983) (reservist); *Mattos* v. *United States*, 412 F.2d 793, 794 (9th Cir. 1969) (per curiam) (reservist); *United States* v. *Carroll*, 369 F.2d 618, 620 (8th Cir. 1966) (reservist). In her first suit, the district court noted petitioner's reserve status and held that her action was "barred under the *Feres* doctrine." App., *infra*, 1a. The district court's decision in petitioner's second suit to bar her from relitigating this issue in the circumstances of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 91-0301 GT(IEG)

DIANE WASHINGTON, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

ORDER

Defendant's motion to dismiss came on for hearing July 8, 1991 at 10:30 a.m. Plaintiff was represented by James C. Knight, Esq. Defendant was represented by Paul J. Boudreaux of the Department of Justice. Having considered the pleadings and arguments in favor and in opposition, the court grants the motion to dismiss for lack of subject matter jurisdiction.

Plaintiff's action is barred under the *Feres* doctrine. The Supreme Court has stated that the United States Government is not liable under the Federal Tort Claims Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". *Feres v. United States*, 340 U.S. 135, 146 (1950).

Plaintiff, while not on active duty, was a reservist and as such has the same status as an enlisted woman

under the *Feres* doctrine. *Mattos v. United States*, 274 F. Supp. 38 (E.D. Cal. 1967), aff'd 412 F.2d 793 (9th Cir. 1969). However, unlike the injuries in *Mattos*, plaintiff's injuries were not received incident to military service.

Nevertheless, the circumstances of this case are similar to *United States v. Shearer* 473 U.S. 52 (1985). In that case, an off-duty serviceman murdered another off-duty serviceman. The estate of one sued the military alleging that they were negligent in their discipline, supervision and control of the murderer. The court held that even though both men were off-duty, the suit nonetheless was barred as it would call into question "basic choices about the discipline, supervision and control of a serviceman". *Shearer* at 58. To do so would be to contravene one of the basic principles of the *Feres* doctrine, as "*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty". The litigation in *Shearer* would have required the court to second-guess the military command. The same is true of plaintiff's case.

Even if plaintiff's action were not barred by the *Feres* doctrine as developed in *Shearer*, plaintiff has no cause of action under the Federal Tort Claims Act. The act grants the court jurisdiction for tort claims against the United States "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place

where the act or omission occurred." 28 U.S.C. §1346(b) (emphasis added). In this case, the court must look to California law as it would apply to a private employer, and whether that employer would have a duty to restrain or influence in any way the sexual behavior of its employees (in this case, Petty Officer Joseph).

Plaintiff presents no case which establishes such a duty. Under California law, an employer has been held not liable for the sexual misconduct of an employee outside the scope of employment. *Jeffrey E. v. Central Baptist Church* 197 Cal. App. 3d 718 (1988).

Plaintiff argues that violation of a rule promulgated by a private entity may be evidence of negligence, citing *Hartford Accident and Indemnity Company v. Bank of America* 220 Cal.App.2d 545 (1963). That case is not controlling given the circumstances leading to plaintiff's injury. Plaintiff must show a legal duty of a private employer which arises from a voluntary policy to somehow instruct or warn employees as to "safe-sex". Plaintiff has not directed the court to a case establishing a duty out of such a gratuitous undertaking, and the court has been unable to locate such a case. A duty arising to a third person out of a gratuitous undertaking is particularly tenuous.

The case is dismissed without prejudice.

IT IS SO ORDERED.

Dated: July 10, 1991 /s/ *Gordon Thompson, Jr.*
GORDON THOMPSON, JR.
United States District
Judge

Supreme Court, U.S.
NOV 18 1994
OFFICE OF THE CLERK

(3)

No. 94-22

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Diane Washington,

Petitioner

v.

United States of America,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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I.

REPLY TO STATEMENT

The district court did not rule Petitioner was precluded from litigating her claim because of a district court in an earlier case had ruled that the Feres doctrine barred her claim. Judge Thompson entered an order dismissing the first complaint filed by Petitioner without prejudice. No judgment was entered. Petitioner revised and refiled her complaint in response to the criticisms made by Judge Thompson. The revised complaint was assigned to Judge Gilliam who accepted jurisdiction.

Petitioner's revised complaint added allegations claiming her injuries were not service connected and that she and the Navy had

agreed that her injuries were not service connected. The revised complaint was challenged by the government on the ground that it was barred by the *Feres* doctrine, and on other grounds, and was held to be sufficient. Pet. App. A-44.

In the hearing related to the government's second motion to dismiss the revised complaint Judge Gilliam made a comment concerning the law of the case which the government now seizes on. This unexplained comment by Judge Gilliam was made after he had stated the apparent reason for his ruling, namely that the government now claimed its policy was not in effect until after Petitioner was injured (Pet. App. A-37). This contention has been withdrawn by the

government in light of the evidence.

Until the ruling on the second motion to dismiss, Petitioner had no reason to believe the revised complaint on file was insufficient, since Judge Gilliam had already denied a motion to dismiss based on the same grounds raised in the second motion. District court judges have the power to change their mind at any time until judgment is entered. Judgment was not entered in this case until October 28, 1992. Petitioner timely appealed from this final judgment.

The court of appeals did not rest its decision on the alleged claim that the matter had already been

decided. Pet.App. A-17, A-18. As the government concedes in its opposition, "the court of appeals declined to address these issues." (Brief in Opp., p.4). All the government's arguments about what might happen when the decision is reversed are pure speculation.

As will be discussed, the procedural issues Respondent raises raises have no merit and have no effect on the Petition. This matter is properly before this Court. If the decision of the court of appeals on the *Feres* doctrine issue is reversed, the outcome will be different.

II.

REPLY TO ARGUMENT

A. Collateral estoppel, issue preclusion, and the law of the case doctrine do not bar the litigation the Feres doctrine issue in this case.

Judge Thompson's order dismissing the first complaint was made specifically without prejudice. Brief in Opp.App. p.3a. What this meant procedurally was that Judge Thompson's order was not a final judgment from which Petitioner had to appeal and was not res judicata. Costello v. United States, 365 U.S. 265, 286 (1961).

Judge Thompson's order also did not collaterally estop Petitioner from raising the *Feres* doctrine issue before the court of appeals when she

appealed the judgment dismissing the case. Prejudgment orders remain interlocutory and can be reconsidered at any time. Peterson v. Lindner, 765 F.2d 698, 704 (7th Cir. 1985). In this case Judge Gilliam had before him the revised complaint and had the power reconsider Judge Thompson's earlier ruling in light of it, which he did twice.

In Deutsch v. Flannery, 823 F.2d 1361, 1364-1365 (9th Cir. 1987) the court found that certain revisions made to a complaint after a motion to dismiss was granted without prejudice were sufficient to cure the defects. The Deutsch court did not estop the Plaintiff from making those changes.

Respondent must establish four elements for collateral estoppel to apply: that the issue sought to be

precluded is the same as that in the earlier action; that the issue was fully litigated; that the issue was determined by a final judgment; and that the issue was essential to the determination. Farmland Industries, Inc. v. Morrison-Quirk Grain Corporation, 987 F.2d 1335, 1339 (8th Cir. 1993). Respondent can not establish any of these elements and certainly not all four of them. Respondent also can not show any real prejudice.

Where an order like Judge Thompson's relies on alternative grounds and is made without prejudice, a party does not have to try to appeal it immediately if the party agrees with one ground and acts accordingly. It is unfair to apply collateral estoppel in

such situations. See, e.g., Deweese v. Town of Palm Beach, 688 F.2d 731, 733-744 (11th Cir. 1982).

Similarly, the law of the case doctrine did not deprive Petitioner of the right to raise the *Feres* doctrine issue in the court of appeals and does not bar her from raising it in this Court. The law of the case doctrine is a rule of practice which does not limit the authority of a higher court. Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 601-602 (9th Cir. 1990). Here, the court of appeal decided the *Feres* issue de novo. All law underlying a judgment (including alleged law of the case) is reviewable on a petition for certiorari. Christianson

v. Colt Industries Operating Corp., 486 U.S. 800, 817-818 (1988).

The procedural cloud Respondent attempts to lose Petitioner in evaporates under the light of analysis. The court of appeals based its decision affirming the dismissal on the *Feres* ground only. If this Court concludes the court of appeals was wrong on the *Feres* issue, Petitioner may proceed. As a civilian she is entitled to recover if she proves her case. Sheridan v. United States, 487 U.S. 392 (1988); See generally Stencel v. Aero Engineering Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting) (reasoning that if a military plane crashes into a civilian's house injuring the civilian, "the civilian

would unquestionably have a cause of action under the Tort Claims Act.")

The government itself recently agreed (in a different case) that a civilian who was hurt because of the negligence of the military may recover under the Federal Tort Claims Act even where, unlike here, the injury occurs on military property and involves the use of a military benefit by the injured party. See Elliot v. United States, 13 F.3d 1555, 1557, n.2 (11th Cir. 1994) vacated and reh. en banc granted on other grounds, 26 F.3d 597 (11th Cir. 1994) (where the government paid a judgment awarded in favor of the civilian wife of an army sergeant who was injured at the on-base apartment in which she and her husband lived because of negligent maintenance.)

B. Petitioner is not claiming that she was hurt because of negligent military health services provided to her or her beneficiaries.

In its opposition (Brief in Opp., p. 6) Respondent cites cases where servicemembers or their beneficiaries were barred from making claims based on negligent health care services provided to them by military health care providers in connection with the use of a military benefit by the servicemember. Petitioner makes no such claims. She is in the position of an independent civilian third party who was hurt because the government negligently breached its duty to her. Compare Persons v. United States, 925 F.2d 292, 297-299 (9th Cir. 1991) (where

the court allowed the claims of the serviceperson's family members related to a failure to provide counseling to them to go forward despite the *Feres* doctrine.) The comments made by the court in the Persons case are illustrative of the gut wrenching agony courts go through when the *Feres* doctrine as it now stands is raised as a defense to claims by civilians. Persons, supra, at 299.

The military agrees its AIDS prevention duties run to the benefit of the civilian population. U.S. v. Dumford, 28 M.J. 836, 838-839 (A.F.M.C.M.R. 1989); U.S. v. Negron, 28 M.J. 775, 778-779 (A.F.M.C.M.R. 1989) aff'd 29 M.J. 324 (C.M.A. 1989). Where third parties are hurt because of a negligent failure to

provide proper health care, or where reasonable care is not exercised to protect potential victims, those civilians are not barred by the *Feres* doctrine from suing the health care provider under California law. Jablonski v. United States, 712 F.2d 392 (9th Cir. 1983); Tarasoff v. Regents of University of California 17 Cal.3d 425 (1976). Similarly, where the military voluntarily agrees to assume a duty, makes it a mandatory regulation and then negligently fails to perform the duty, an injured civilian may recover. Dogget v. United States, 875 F.2d 684 (9th Cir. 1989).

C. Petitioner was not a "reservist" when she was injured.

The "reservist" cases cited by the Respondent are all readily

distinguishable from the facts of the instant case. Those cases support Petitioner's contention that she should be treated like a civilian.

In Stencel v. Aero Engineering Corp., supra, at 673 this Court focused on the fact that because the injured soldier was on duty at the time of the injury and concluded military discipline might be improperly interfered with if a suit was brought by the soldier. Here, the injured Plaintiff was not on active or inactive duty or training, was not under orders, and was not subject to military discipline at the time she was hurt. She, unlike the injured serviceperson in Stencel, supra, at 673, is not entitled to benefits because her injury was not service connected.

In Stencel, supra, at 669 n. 6, the Court granted certiorari because of the difficulty the lower courts were having in applying the *Feres* doctrine. This difficulty has not diminished since that time as is indicated by the conflicting results reached in the different circuits as outlined in the Petition.

In Anderson v. United States, 724 F.2d 608, 609-610 (8th Cir. 1983), the court of appeals found the *Feres* doctrine applied because the plaintiff was under orders, on duty, and actually AWOL at the time he was hurt. None of that is true of Petitioner.

In United States v. Carroll, 369 F.2d 618, 621 (8th Cir. 1966) the court of appeals listed four factors on which it relied in determining

that the plaintiff suffered injuries incident to service: the plaintiff was travelling by military transportation; the plaintiff was travelling to a military reserve drill; the plaintiff was in uniform; and the plaintiff was subject to military courtesies and discipline. The Carroll court also noted that the plaintiff was being paid as a reservist at the time of the injury. United States v. Carroll, supra, at 620. None of those factors apply in this case.

Finally, in Mattos v. United States, 412 F.2d 793, 794 (9th Cir. 1969) the court of appeals held the parents of a reservist who was killed by a military truck while he was on weekend military reserve duty could not sue the government because of

Feres doctrine. The Mattos court found there was no merit in an alleged distinction between an on duty reservist and a full-time on duty serviceperson. Ibid. The Mattos court reasoned, "As in *Feres* the availability of compensation for injuries incurred in military service renders such intrusion [i.e., into military performance] unnecessary." Ibid. The situation in this case is completely different. The Petitioner was not on reserve duty when she was injured, she was not on a military base, she was not using military equipment or receiving any military benefit, and, she was specifically denied the right to any compensation because her injuries were not

connected to military service.

In Feres v. United States, 340 U.S. 135, 139 (1950) this Court noted that the Federal Tort Claims Act does not prohibit all claims by servicepersons. This law should not be rewritten by judicial decision to bar the claim of an off-duty reservist whose injuries were suffered while she was engaged in a nonmilitary act, was not on military property, and where her injuries were related to her military status only in the sense that all human events depend on what has already transpired. Green v. Hall, 8 F.3d 695, 700 (9th Cir. 1993) cert. den. - U.S. -, 115 S.Ct. 58 (1994). Petitioner's rights are the same as those of any other civilian.

III.

CONCLUSION.

At the time she was injured, Diane Washington was a civilian, a person who was not a member of the military. The *Feres* doctrine does not bar claims by persons who are not members of the military. Brief in Opp. p. 6, citing U.S. v. Brown, 348 U.S. 110 (1954). Therefore, Petitioner's claims are not barred by the *Feres* doctrine and the decision of the court of appeals is incorrect.

The petition should be granted because the scope of the *Feres* doctrine must be clear or it will continue to trouble the lower courts.

Respectfully submitted,

Dated: 11/7/14

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